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APR

CHARLES ELMORE

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1931.

No. 722.

UTAH POWER & LIGHT COMPANY, A CORPORATION,
Appellant,

v.

EMMITT PFOST, COMMISSIONER OF LAW ENFORCEMENT OF THE STATE OF IDAHO, AND FRED J. BABCOCK, ATTORNEY GENERAL OF THE STATE OF IDAHO,
Respondents.

BRIEF FOR APPELLANT.

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UTAH POWER & LIGHT COMPANY, a corporation,
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AGAINST

EMMITT PFOST, Commissioner of Law Enforcement of the State of Idaho, and FRED J. BABCOCK, Attorney General of the State of Idaho,
Respondents.

BRIEF FOR APPELLANT.

Statement of the Case.

This appeal is from a final decree of a special statutory court convened in the Southern Division of the District of Idaho, under Section 380, Title 28, U. S. C. A. (Section 266 of the Judicial Code as amended), dissolving an interlocutory injunction theretofore issued by said court and denying a permanent injunction, in a suit to restrain the enforcement of a statute of a state upon the ground of the unconstitutionality of such statute. This direct appeal to this Court therefore is taken and lies under the express provisions of that section and of Section 345, Title 28, U. S. C. A. (Judicial Code, Section 238, as amended). The decision of the court below on the application for interlocutory

injunction is reported in 52 Fed. (2nd) 226; and the decision on final hearing in 54 Fed. (2nd) 803.

Appellant filed its Bill of Complaint on June 16, 1931, seeking an interlocutory and permanent injunction restraining the respondents from enforcing a certain Act passed by the 1931 Extraordinary Session of the Legislature of the State of Idaho, described as Chapter 3 of the Laws of that Session, and, briefly, providing for the payment of a tax of one-half mill per kilowatt hour upon "all electricity and electrical energy generated, manufactured or produced in the State of Idaho" (R. 16-20). The Act is referred to herein as the "Tax Act", and is quoted in full in the Appendix.

The appellant, which in addition to similar business in Idaho, generates and transmits electric power and energy in and through Idaho to Utah and through Utah to Wyoming for distribution and use in the latter states, alleges in its Bill of Complaint that said Act is unconstitutional (1) because it is in conflict with Article 1, Section 8, Clause 3 of the Constitution of the United States in that it imposes a direct burden on interstate commerce engaged in by the appellant; (2) because of other defects intrinsic to the Act and apparent on its face, which will be hereinafter stated.

The appellant further alleges in its Bill the usual jurisdictional averments, and invokes the equitable jurisdiction of the court because it has no remedy at law, and will suffer irreparable injury and be subjected to a multiplicity of suits, and to unreasonable and excessive penalties, if it refuses to pay the tax, and attempts to litigate the constitutionality of the Act (R. 15). There is no provision in the Act or in the general statutes of Idaho for the recovery of any taxes paid if the Act is held to be unconstitutional, and reimbursement of any money so paid could only be had by a subsequent act of the Legislature of the State (R. 15). It is these features of the Act which entitle appellant to equitable relief within the rule of *Ohio Oil Co.* v. *Conway*, 279 U. S. 813, as held by the court below (R. 37), and which exclude the application of the rule recently involved in *Matthews* v. *Rodgers* (decided February 15, 1932, Adv. Op. 271).

After the interlocutory injunction was granted, defendants answered, the case was heard before a master, who reported the testimony to the statutory court, which rendered its opinion adverse to appellant on December 30, 1931 (R. 56-63), made findings of fact and conclusions of law accordingly (R. 84-94), and on February 15, 1932, entered a decree dissolving the interlocutory injunction, and requiring the payment of the tax in question (R. 95). This appeal is from the final decree (R. 216) and brings up a statement of the evidence (R. 96-216) and exceptions (R. 80-83) to the findings and conclusions made by the court, which exceptions were allowed (R. 83-84), and to the refusal by the Court (R. 80) of appellant's requests for findings and conclusions (R. 64-79). With respect to appellant's exceptions, it should be observed that the printed record omits by stipulation (R. 237) paragraphs 1 to 24 of the exceptions, on the ground that they are specifically recited in paragraph XVI of the Assignment of Errors (R. 224-229), it being stipulated that "such exceptions are sufficient to present for review all matters assigned as error in paragraph No. XVI of said Assignment of Errors", and are omitted from the printed record to avoid repetition and shorten such record (R. 237).

Statement as to Jurisdiction on Appeal was filed in this Court on February 26, 1932, and this Court on March 14, 1932 noted probable jurisdiction, and in conformity with a motion made by appellant and consented to by the respondents, on the same day advanced this case for argument to be heard with the cases of *South Carolina Power Company* v. *South Carolina Tax Commission*, No. 542, October Term, 1931; *Broad River Power Company* v. *Same*, No. 566, October Term, 1931; *Lexington Water Power Company* v. *Same*, No. 567, October Term, 1931.

The reason for the argument of these cases together is that they all involve, as a common question, the contention that a state tax upon kilowatt hours of electric energy is, as to energy which moves in interstate commerce, a burden on such commerce. The different cases involve different aspects of

that common question. The particular aspect of the question presented in this case will be hereinafter stated.

In addition to this question of interstate commerce common to these cases, there are also presented other questions of equal importance to a determination of this case, which are not involved in the South Carolina cases. They will appear from the following brief statement of the facts, and are specifically stated in the specification of errors.

The essential facts necessary to an understanding of the questions presented to the court below, and to be presented to this Court, are as follows:

In 1931 the Idaho Legislature met in regular session. During this session an attempt was made to pass an act designed to levy a tax upon the production, generation and manufacture of electricity and electrical energy. A bill was introduced for this purpose known as House Bill No. 44. It was before the Idaho Legislature for about forty days, during which period of time hearings were had before a committee to which the bill had been referred. The Legislature, at its regular session, did not pass the bill, but it did, however, levy the general *ad valorem* tax sufficient to meet all expenses of the government of the State for the ensuing biennium (R. 100).

The Legislature adjourned *sine die* on the 5th day of March, 1931. On the same day and prior to the adjournment, the Governor issued a proclamation calling the Legislature to meet in special session on the 6th day of March, 1931, for the purpose of considering revenue legislation.

The extraordinary session of the Legislature convened pursuant to the call on March 6, 1931. Thereupon, the Governor read a message in which he urged the passage of an income tax bill and of a bill imposing a tax upon electrical energy generated within the State of Idaho.

The Act now under review was passed March 13th, was signed by the Governor on March 17th, and became effective May 12, 1931.

A brief summary of the Act is as follows (Act quoted at length in Appendix).

The title purports to levy "a license tax of one-half mill per kilowatt hour on electricity and electrical energy generated, manufactured or produced in the State of Idaho for barter, sale or exchange" and that there shall be exempted from the tax "the electricity and electrical energy actually used for pumping water for irrigation purposes on lands in the state of Idaho and providing that such exemptions shall accrue to the benefit of the consumer". The title is important. We shall point out variations between title and Act, and that two subjects are embraced in both.

Section 1 provides: That in addition to the licenses and taxes now provided by law, every individual, corporation, etc., engaged in the "generation, manufacture or production of electricity and electrical energy in the State of Idaho" for "barter, sale or exchange" shall, on or before the 15th day of each calendar month, beginning with July 15, 1931, render a statement to the Commissioner of Law Enforcement of the State of Idaho of all electricity and electrical energy, generated, manufactured or produced in the State of Idaho during the preceding calendar month and therewith pay a license tax of one-half mill per kilowatt hour on all such electricity and electrical energy so "generated, manufactured or produced, measured at the place of production."

Section 5 is unique. Undoubtedly it was inserted to secure passage of the Act. House Bill 44 (R. 101), which failed of passage at the regular session, did not contain this or a similar provision. This section provides, in effect, that "all electricity and electrical energy used for pumping water for irrigation purposes to be used on lands in the State of Idaho is exempt" from the provisions of the Act, which exemption, however, shall "accrue to the benefit of the consumer of such electricity or electrical energy." It further provides that the "producer" of such electrical energy shall credit annually the amount of tax that would otherwise be paid "on the power bills to the consumers of such electricity and electrical energy for pumping of water for irrigation to be used on lands in the State of Idaho." This section plainly uses the power of taxation for private benefit.

The penalties prescribed in the Act for failure to conform to its requirements are severe. Section 2 imposes an interest penalty of 10% on delinquencies. Section 7 makes false statements perjury without reference to guilty knowledge or intent. Section 8 makes the producer who fails to pay the tax when due, liable for three times the amount of the unpaid tax, and to injunction without bond restraining the production of electric energy until the tax is paid. There is no provision in the Act or under the general laws of the State for payment of the tax under protest or recovery of taxes illegally collected (R. 15).

Section 9 provides that the amount of the tax collected thereunder shall be deducted from the general state *ad valorem* tax on real and personal property, thus reducing the tax otherwise payable by the taxpayers of the state at large.

The appellant owns and operates an inter-connected alternating current electric power system consisting of generating stations, transmission and distribution lines, and other electrical equipment located in the States of Idaho, Utah and Wyoming, by which energy in the electrical form is generated, transmitted and distributed in barter, sale and exchange to its customers in all three states. As will be later shown, the "generation," "manufacture" or "production" of electric energy is integral with, and inseparable from, its transmission and use, and upwards of 84 per cent of all electric energy generated by the appellant in Idaho is generated and transmitted directly in interstate commerce for use in Utah and Wyoming.

Appellant, during the year 1930, paid in *ad valorem* taxes in the State of Idaho $412,090.07, upon an assessed valuation of $11,088,009.00. In addition thereto, it paid its annual license tax imposed by the State for the privilege of doing business therein. It will likewise be required to pay an income tax pursuant to an Act passed at the same extraordinary session. If the Act now under attack is valid, appellant will be required to pay upwards of $100,000 per year additional, or a total, exclusive of income tax, of over

$510,000. Appellant received in the year 1930, from its customers in Idaho for electric energy sold therein, approximately $735,000.00 (Findings, R. 88). Thus, approximately 70 per cent of its revenues from Idaho business exclusive of interstate business is now demanded by the State of Idaho in taxes.

There is no substantial controversy as to material facts, except on the question of the nature of electrical processes as involved in the solution of the question as to whether the tax burdens interstate commerce, and the matters there in dispute are more in the nature of the ultimate conclusions to be drawn from the facts than of the facts themselves.

The contentions of appellant in its Bill, which were decided adversely to it by the special statutory court below, are stated in the following Specification of Errors:

Specification of Errors.

Appellant will urge the following assigned errors preserved in its "Statement of Points to be Relied Upon".

I.

The special statutory court, sitting in the District Court for the District of Idaho, Southern Division (hereinafter referred to as the court), erred in dismissing appellant's Bill of Complaint, dissolving the interlocutory injunction theretofore issued, ordering payment of the tax required by the Tax Act described in the Bill of Complaint, and in refusing to decree a permanent injunction restraining enforcement of said Tax Act, as against the appellant, the specific grounds of such error being hereinafter stated (Assignment of Errors No. I) (R. 217).

II.

The court erred in finding and concluding that the Tax Act, as applied to the appellant and its operations, does

not impose a direct burden on interstate commerce, in violation of Clause 3, Section 8, Article I of the Constitution of the United States. (Assignment of Errors No. III) (R. 218).[1]

III.

The court erred in not finding and concluding that the Tax Act denies appellant equal protection of the laws and deprives appellant of its property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States, and also Section 13 of Article I of the Constitution of the State of Idaho, in that Section 5 of said Act compels the appropriation and payment of money by appellant for the sole and exclusive benefit of private individuals without compensation to appellant therefor (Assignment of Errors Nos. IV and VII) (R. 218, 219).[2]

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[1] Under this point there are presented the errors in the Findings of Fact and Conclusions of Law, relating to the interstate commerce question the making of which is assigned as error in paragraphs Nos. XIV (R. 220, 221, 222), and XV Subdiv. (k) (R. 224), of the Assignment of Errors, and the failure and refusal of the court to make the Findings of Fact and Conclusions of Law requested by the appellant in its motion therefor, such failure and refusal being specifically set forth in paragraphs Nos. XVI Subdivisions (a) to (s) inclusive (R. 224, 225, 226, 227, 228, 229), and XVII subdiv. (i) (R. 234), and XVIII (R. 234), of the Assignment of Errors.

[2] Under this point there are presented the errors in the Conclusions of Law, the making of which is assigned as error in paragraph No. XV Subdivisions (a), (b) and (d) (R. 222, 223), of the Assignment of Errors, and the failure and refusal of the court to make the Findings of Fact and Conclusions of Law on this point requested by appellant in its motion therefor, such failure and refusal being specifically set forth in paragraphs Nos. XVI, Subdivision (t), and XVII, Subdivisions (b), (c) and (e) (R. 229, 232, 233) of the Assignment of Errors.

IV.

The court erred in not finding and concluding that the Tax Act violates Section 2 of Article VIII, and Section 2 of Article VII of the Constitution of the State of Idaho, in that said Tax Act constitutes the levying of a tax for other than a public purpose, to wit: for the benefit of an individual (Assignment of Errors No. V) (R. 218). The court also erred in not finding and concluding that the Tax Act violates Section 6 of Article VII of the Constitution of the State of Idaho in that it imposes a tax for the benefit of municipal corporations, to wit: irrigation districts (Assignment of Errors No. VI) (R. 218).[3]

V.

The court erred in not finding and concluding that the Tax Act violates Section 16 of Article III of the Constitution of the State of Idaho, which provides that every Act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title (Assignment of Errors Nos. VIII, IX and X) (R. 219).[4]

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[3] Under this point there are presented the errors in the Conclusions of Law, the making of which is assigned as error in paragraph No. XV, Subdivisions (e), (f), (g) and (h) (R. 223), of the Assignment of Errors, and the failure and refusal of the court to make the Findings of Fact and Conclusions of Law on this point requested by the appellant in its motion therefor, such failure and refusal being specifically set forth in paragraphs Nos. XVI, Subdiv. (t), and Subdiv. (u) B, and XVII, Subdiv. (e) (R. 229, 233), of the Assignment of Errors.

[4] Under this point there are presented the errors in the Conclusions of Law, the making of which is assigned as error in paragraph No. XV, Subdiv. (c), (R. 222, 223) of Assignment of Errors, and the failure and refusal of the court to make the Findings of Fact and Conclusions of Law requested by appellant in its motion therefor, such failure and refusal being specifically set forth in paragraphs Nos. XVI, Subdiv. (u) A, and XVII, Subdiv. (d), (R. 229, 230, 232, 233) of the Assignment of Errors.

VI.

The court erred in not finding and concluding that the Tax Act is void and unenforcible for the various uncertainties and ambiguities alleged in the Bill of Complaint, and that the enforcement thereof would constitute taking appellant's property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States (Assignment of Errors No. XIII) (R. 220).[5]

VII.

The court erred in not finding said Tax Act void, as applied to the appellant and its operations, for each of the reasons herein recited, and in not also finding and concluding that Section 5 of said Tax Act cannot be eliminated from said Tax Act without destroying the entire Act, and that it is impossible to segregate the tax attempted to be imposed by the said Tax Act and measured by the intrastate business done by the appellant from that measured by the interstate business done by the appellant, and that said Tax Act, because of the inseparability of the intrastate business and the interstate business, is void *in toto* (Assignment of Errors, No. XVII (c) and (j)) (R. 232, 234).

VIII.

The evidence as a whole, and particularly that evidence showing the process of generation, transmission and use of electric energy upon the appellant's system and the manner and method of appellant's operations in the generation, transmission and sale of electric energy in and between the States of Idaho, Utah and Wyoming, fails to support the Findings

[5] Under this point there are presented the error in the Conclusion of Law, the making of which is assigned as error in paragraph No. XV, Subdiv. (j) (R. 224) of the Assignment of Errors and the failure and refusal of the court to make the Findings of Fact and Conclusions of Law on this point requested by appellant in its motion therefor, such failure and refusal being specifically set forth in paragraphs Nos. XVI, Subdivisions (v) and (w), and XVII, Subdiv. (h), (R. 231, 233) of the Assignment of Errors.

of Fact made and entered by the court and the Conclusions of Law drawn therefrom and the Decree based thereon, but requires the Findings proposed by the appellant and the Conclusions of Law and Decree requested by it to be made and entered (Assignment of Errors No. XVIII) (R. 234).

Numbers I and VIII of the above Specification of Errors are general and apply to the argument under the other specifications. Numbers III and IV may be conveniently discussed together and Number VII may be best discussed in connections with Numbers II, III and IV.

Therefore, in brief, the points for discussion may be classified as follows:

1. That the Tax Act imposes a direct burden on interstate commerce in violation of Clause 3, Section 8, Article I of the Constitution of the United States.

2. The Tax Act denies appellant equal protection of the laws and deprives it of property without due process in violation of the Fourteenth Amendment to the Constitution of the United States, and Section 13 of Article I of the Constitution of the State of Idaho, in that Section 5 of said Act compels the appropriation and payment of money by appellant for the benefit of private individuals, and for the same reasons violates Section 2 of Article VII and Section 2 of Article VIII of the Constitution of Idaho in that it levies a tax for other than for a public purpose, to wit: for the benefit of individuals, and violates Section 6 of Article VII of the Constitution of Idaho in that it imposes a tax for the benefit of municipal corporations, to wit: irrigation districts.

3. The Tax Act violates Section 16 of Article III of the Constitution of Idaho, which provides that every Act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title.

4. The Tax Act is void and unenforcible for the various uncertainties and ambiguities alleged in the Bill of Complaint, so that the enforcement thereof would constitute arbitrary administrative action, without legislative guide, and thus take appellant's property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

I.

POINT.

The Tax Act imposes a direct burden on interstate commerce in violation of Clause 3, Section 8, Article I of the Constitution of the United States.

Authorities.

United States Constitution, Article I, Section 8, Clause 3.

Public Utilities Commission of Rhode Island v. *Attleboro Steam & Electric Company,* 273 U. S. 83.

Idaho Power Company v. *Thompson,* 19 Fed. (2nd) 547.

Northern Pacific Railway Co. v. *Gifford,* 25 Idaho 196.

Postal Telegraph Cable Company v. *Adams,* 155 U. S. 688.

State Freight Tax Cases, 15 Wall (U. S.) 232.

Smith v. *Turner* (*Passenger Case*), 7 How. (U. S.) 283.

State Tonnage Tax Cases, 12 Wall (U. S.) 204.

Telegraph Co. v. *Texas,* 105 U. S. 460.

LeLoup v. *Port of Mobile,* 127 U. S. 640.

Western Union Telegraph Company v. *Alabama,* 132 U. S. 472.

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Technical Radio Laboratory v. *Federal Radio Commission,* 36 Fed. (2nd) 111.

New Jersey Bell Telephone Company v. *State Board of Taxes, etc.,* 280 U. S. 338.

Sprout v. *City of South Bend*, 277 U. S. 163.
Crew Levick Co. v. *Pennsylvania*, 245 U. S. 292.
Helson v. *Kentucky*, 279 U. S. 245.
Eureka Pipe Line Company v. *Hallanan*, 257 U. S. 265.
United Fuel Gas Co. v. *Hallanan*, 257 U. S. 277.
Coe v. *Errol*, 116 U. S. 517.
Champlain Realty Co. v. *Town of Brattleboro*, 260 U. S. 366.
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Bowman v. *Continental Oil Company*, 256 U. S. 642.
United States v. *Reese*, 92 U. S. 214.
Allen v. *Louisiana*, 103 U. S. 80.
Pollock v. *Farmers Loan & Trust Co.*, 158 U. S. 601.
International Textbook Company v. *Pigg*, 217 U. S. 91.
Oliver Iron Company v. *Lord*, 262 U. S. 172.
Hope Natural Gas Co. v. *Hall*, 274 U. S. 284.
American Manufacturing Company v. *St. Louis*, 250 U. S. 459.
Heisler v. *Thomas Colliery Co.*, 260 U. S. 245.
East Ohio Gas Co. v. *Tax Commission*, 283 U. S. 465.
South Carolina Power Company v. *South Carolina Tax Commission*, 52 Fed. (2nd) 515.

Summary.

(1) The tax involved in this case—on the kilowatt hour of electric energy—is not a tax on the manufacture of goods or on the production or extraction of a product of nature but on the transfer or conveyance of energy in nature from its source to its place of use. When this transfer is across state lines it is interstate commerce (*infra*, pp. 17-21).

(2) The "generation" of electric energy is a part of the process of transferring energy from a source in nature such as falling water to some point where it may be usefully applied. Energy cannot be "generated, manufactured or produced" except as it is transmitted and used. The process through the generator is continuous and simultaneous with the consumer's demand for energy. That part of the process described as generation is the part which is responsible for and causes the movement. The generator is thus an instrumentality of commerce. The entire combined process of generation, transmission and use is integral, continuous and essentially simultaneous. Electric energy travels approximately at the speed of light, 186,000 miles per second (*infra,* pp. 21-26).

(3) Energy transferred to the consumer is drawn directly from its source at the water fall and is not stored in the system either at the consumer's place of use or some intermediate point. It is not analogous to a water or gas system with storage facilities either separately furnished or present in the water main or gas pipes (*infra,* pp. 26-27).

(4) Transformers interposed in the system for economy in transmission, while they result in interrupting the flow of electric current and in the induction of a different voltage and current on the other side of the transformer do not interrupt the flow of electric power and energy. This passes directly from its source through the transformers along the transmission line to the place of use. It is this energy, and not current or voltage, measured in terms of kilowatt hours, which is taxed by the Act involved in this case (*infra,* pp. 27-30).

(5) So-called losses in the electric system on account of which more energy leaves the generator than is delivered to the consumer do not alter the fundamental nature of the process. The system itself is a consuming device to the extent that it requires the transfer of certain energy from the source

to enable the system to function and keep it electrically alive. These so-called losses are used in the system and impress a demand upon the generator of exactly the same nature as the demand exerted by the devices of the consumers (*infra*, pp. 30-31).

(6) The kilowatt hour is a mathematical product of the power relation in the electric circuit between the generator and the receiving device measured in kilowatts and hours. It is a measure of the relationship expressed in terms of power demand (kilowatts) and the duration in time that that demand is exerted (hours). It is therefore a measure of the use of the vehicle of commerce which we call the electric system. Energy conceived of as leaving a generator in one state in response to the demand of a consumer in another state, and measured in terms of kilowatt hours, is in transit, and in fact actually crossing the state line and used by the consumer in the second state simultaneously with its measurement (*infra*, pp. 31-35).

(7) That part of appellant's system which consists of generating stations in Idaho, and transmission lines across the Utah-Idaho line to Utah to the terminal substation in Utah where it is connected with transmission lines for local distribution systems to consumers' devices, operates in interstate commerce. Whether such commerce extends beyond the terminal substation is not involved in this case. *Public Utilities Com. of R. I.* v. *Attleboro Steam & Elec. Co.*, *supra*; *Idaho Power Company* v. *Thompson*, *supra* (*infra*, pp. 35-37).

(8) The tax imposed by the Act under review is a license tax exacted of appellant as a condition of continuing its business. As applied to interstate business, it is similar to a tax on a ton of freight, considered in the *State Freight Tax Cases*, or upon passengers carried, as in the *Passenger Cases*, or on the tonnage of vessels, as in the *Tonnage Cases*, or upon telegraph messages as in the *Telegraph Cases*. Being levied

at a unit rate on energy in interstate commerce, it cannot be sustained as a license tax for the privilege of conducting an intrastate business (*infra*, pp. 37-41).

(9) While the Act describes the tax as levied upon the kilowatt hour generated, manufactured or produced, yet the process of generation is simultaneous and interdependent with the transmission and use. The Act burdens transmission and use equally with generation. The generator is an instrumentality of commerce. It is this inseparability of process which makes the whole interstate commerce. *Foster Packing Co.* v. *Haydel, supra; Station WBT* v. *Poulnot, supra,* and other cases cited. In this respect, it is also within the rule of *New Jersey Bell Tel. Co.* v. *State Board of T. & A.; Sprout* v. *City of South Bend* (*infra*, pp. 41-47).

(10) Since the tax falls and has its incidence on energy already in commerce, and is measured by the amount of the commerce in energy, it is likewise void under the rule announced in *Eureka Pipe Line Co.* v. *Hallanan; Coe* v. *Errol; Champlain Realty Co.* v. *Town of Brattleboro;* and other cases cited (*infra,* pp. 47-48).

(11) The Act in burdening interstate commerce is void in its entirety because it appears that the intent of the Act is to tax the whole business and no provision is made for the separate determination of interstate and intrastate business. *Crew Levick Co.* v. *Pennsylvania; Bowman* v. *Continental Oil Co., supra,* (*infra,* pp. 48-50).

(12) The statutory court erred in its findings of fact and conclusions of law, wherein it found certain facts inconsistent with the evidence and conclusions deducible therefrom as hereinbefore stated, and held that the Tax Act is valid and does not burden interstate commerce (*infra,* pp. 50-55).

(13) Decisions in *Hope Natural Gas Company* v. *Hall, supra, Oliver Iron Company* v. *Lord, supra, Heisler* v. *Thomas Colliery Co., supra, American Manufacturing Company* v. *St. Louis, supra, East Ohio Gas Co.* v. *Tax Commission, supra,* reviewed and distinguished (*infra,* pp. 55-59).

Argument.

The tax involved in this case—on the kilowatt hour of electric energy—is not a tax on the manufacture of goods or on the production or extraction of a product of nature but on the transfer or conveyance of energy in nature from its source to its place of use. When this transfer is across state lines it is interstate commerce.

The language of the Idaho Statute (herein called "Tax Act") in purporting to levy a tax on the "manufacture" or "production" of electricity or electric energy begs the question at issue by designating the electrical process as something that it is not. For purposes of designation, we use the other statutory term "generation", but without preconception as to its meaning.

Our fundamental thesis is that an electric system, consisting essentially of what are called generator, transmission line, and consumer's motor or other consuming device, is an integral unitary apparatus for the transfer of energy from its source (as a waterfall) to and use at destination. No part of this apparatus, *e. g.,* the generator, can function except as a part of the whole, synchronously and integrally therewith. The functioning of the generator is dictated by the consumer, who through it, in conjunction with the transmission line and his consuming device, draws energy at his will directly from its source The generator is an instrumentality of commerce, the function of which is to cause the energy to flow in the electric vehicle. The commercial unit of measurement which is sought to be taxed by the Tax Act,—the kilowatt hour,—is a measure of the magnitude and duration

of the consumer's use of the facilities provided for the transfer of the energy. In other words, an electrical system, in all its parts, is a vehicle for the transfer of energy; the kilowatt-hour is the commercial measure of the consumer's use of that vehicle. The energy is in commerce during the entire course of its transit through the electric vehicle. Consequently, a tax on the kilowatt hour is upon the measure of use in commerce of a vehicle of commerce, or upon the energy while in commerce. In either case when such commerce is between states the tax falls under the condemnation of the commerce clause of the Constitution.

In the development of this thesis, which necessarily involves a scientific as well as a practical conception of electrical processes, we refer directly to the testimony of the witnesses in the case, and we must invite the court's attention to a somewhat technical discussion of the processes involved, as well as to their practical application in business and commerce.

By way of introduction we first present the witnesses.

The scientific or technical witnesses for the plaintiff were:

Dr. Robert A. Millikan, Director of the Norman Bridge Laboratory of Physics of the California Institute of Technology, Pasadena, California, and probably the most widely known physicist of the country today; Dr. Irving Langmuir, Associate Director of the Research Laboratory of the General Electric Company at Schenectady, New York, and F. W. Peek, Chief Engineer of the General Electric Company's Transmission and Transformer Works at Pittsfield, Massachusetts, one of the country's best known engineers on electrical transmission, and author of the article on Transformers in the Encyclopedia Brittanica, Fourteenth Edition, cited and relied on by the lower court in the cases of *South Carolina Power Company* (and other companies) v. *South Carolina Tax Commission* (Nos. 542, 566 and 567) now under review by this Court with this case.

The respondents' principal witness on the technical or scientific aspects of the case was Dr. Carl Magnusson, Professor

of Electrical Engineering at the University of Washington, Seattle, Washington, and a well known author of text books in this field. In addition to Dr. Magnusson there testified on behalf of respondents, Mr. Wellington Rupp, an engineer of Seattle.

The appellant's system and its operations as between Idaho and Utah were described by a former chief engineer, Mr. Markham Cheever, and the present chief engineer of the appellant company, Mr. J. A. Hale. The commercial aspects of the company's operations as involved in its business between Idaho and Utah were testified to by the company's president and general manager, Mr. G. M. Gadsby.

We think it may be fairly stated that there is no substantial dispute on material facts either scientific or practical. The real dispute in the case arises from the conclusions which counsel draw from facts which in themselves are substantiated by all the testimony. If there is a difference between the scientific witnesses for the appellant and those for the respondents it is rather one of emphasis and terminology than of fact. These scientific witnesses are authorities in their fields and entitled to the full confidence of this Court.

Definition of terms:

The Tax Act under consideration in this case uses the terms "manufacture", "production", and "generation" interchangeably. It likewise uses, as synonyms, the terms "electricity", and "electrical energy". It speaks of "kilowatt hours of electricity and electrical energy" as "produced", or "manufactured" as one would speak of quantities of a material thing. The lower court in the South Carolina decision (No. 542) apparently conceives of "electric current" as the thing which is generated, or produced, by the generator, and shipped in commerce. While these uses of terms are common in popular parlance, and are sometimes followed by the witnesses in this case, they are inaccurate, and unless clearly understood, lead to incorrect conclusions on the essential nature of the process involved. It is necessary, therefore, to preface our discussion with accurate definitions.

Mr. Peek says (R. 184-187) and Dr. Magnusson concurs (R. 206):

"*Electricity* is a subtle imponderable physical agency manifesting itself in certain known ways. While the essence of electricity may be considered as yet somewhat obscure, its laws and characteristics are so well-known by the electrical engineer as to enable him to design electrical apparatus and predict their performance with great precision."

"*Electric current*"—"Electricity may be either at rest or in motion. Electricity in motion constitutes electric current."

"*Electric voltage*"—"Called also electric tension and electro-motive force, is a state of electro-magnetic medium somewhat analogous to mechanical pressure."

"*Electric power*"—"Power manifesting itself through the instrumentality of electric voltage and current is known as electric power."

"*Electric energy*"—"Electric power used through a period of time is known as electric energy."

"*A generator* is an instrumentality whereby energy may pass from a mechanical medium into an electric medium. A generator does not, in any sense, generate or produce 'current' or electricity. It does not generate energy. It can be said to generate an electric tension or voltage, that is, a certain state of the electric medium, whereby it becomes possible for electricity that is already dormant to get into circulation, and whereby it becomes possible for a useful load to draw energy from a distant waterfall."

"*Transformers* are electrical links making it possible to connect circuits of different voltage and current with each other."

The tax in this case is on the kilowatt hour. With respect to this unit of measurement, Dr. Millikan says (R. 111):

> "The kilowatt or one thousand watts is a measure of electric power. It is comparable to the horsepower by which mechanical power is measured. The horsepower is the power required to lift a 550 pound weight one foot in one second of time. A kilowatt is approximately four-thirds of a horsepower, and therefore is an expression of the power required to lift 737.6 pounds one foot in a second.
>
> A 'kilowatt hour', the usual unit for measuring energy in the electrical form, is a mathematical product of the power relation in the electrical circuit between the generator and a receiving device measured in kilowatts, and the duration of time over which that utilization is measured in hours."

Description of electrical processes:

Much of the obscurity to the nonscientific mind which surrounds the process which we are considering in this case, is avoided if the above definitions are clearly kept in mind throughout the discussion.

Dr. Millikan (R. 110, 111), describes this process as follows:

> "The terms 'generation', 'manufacture' and 'production' as applied to energy in the electrical form are merely convenient designations applied to one aspect of the process of transferring energy from some source in nature, such as falling water, for example, to some point where it may be usefully applied.
>
> The various facilities used in the process of electrical supply are purely transferring devices. The falling water pushes against the blades of a water-wheel, thus causing the shaft to revolve and with it the rotating portion of the electric generator. The power of the water is transferred mechanically along the shaft from the water-wheel to the generator continuously and essentially simultaneously with the demand upon the generator. The electric generator consists essentially of a system of conducting wires moving through a magnetic field. This process serves to transfer the mechanical

energy of the motion to electrical energy in the wires. In this process of transfer of the energy from the mechanical to the electrical form, no material is required or consumed. The energy drawn from the water is merely changed from one form to another and passed along. The process through the generator is continuous and the action essentially simultaneously with the consumer's demand for energy.

There is a continuous electrical and electromagnetic path or circuit between the windings in the generator and the windings in the consumer's motor or between the generator windings and the filament in an electric lamp or the electrodes in an electro-chemical cell. The entire electric system functions to transfer the force of the falling water to, and to apply it at, the point where it is to be utilized. Except as and during the period that energy is called for, and used at the final point of utilization, the electric generator neither receives from the water-wheel-shaft, nor delivers to the electric transmission line, any energy other than that necessary to hold the equipment under constant rotation and electric charge in instant readiness to serve.

The entire combined process, mechanical, electrical and magnetic, is integral, continuous and essentially simultaneous, or instantaneous. Electricity travels approximately at the speed of light, 186,000 miles per second."

So intimate and interdependent is the relationship of generator to transmission line and consuming device, that if the full amount of water for which the turbine is designed is permitted to pass through the gates, and the generator is thus caused to revolve without being connected to a transmission line or consuming device, the generator would destroy itself through the operation of centrifugal force, or burn itself up through mechanical heat (R. 121-122). In other words, a generator cannot operate electrically to convert, produce or transfer electrical energy, except as connected to an electrical system including consuming devices.

Dr. Langmuir describes the process in different language, but with essentially the same effect. Summarizing from his testimony (R. 124-128), without quoting in detail, he says:

One of the most important natural laws is the principle of the conservation of energy, according to which energy cannot be created nor destroyed but can merely be transformed or converted from one form to another. Mechanical energy may be transmitted by a series of belts, or rotating shaft, or by compressed air, or by water transmitted through a pipe line. The most important method of transmitting energy, as such, is by electric transmission. In the case of water power, water from a reservoir at a high elevation is allowed to flow to a point at lower elevation by means of which its potential or gravitational energy is automatically transformed into kinetic energy. A turbine is interposed whose blades receive the impact of the rapidly moving water and the kinetic energy is delivered to the shaft in the form of mechanical energy. Connected to this rotating shaft is a generator in which copper conductors are made to move across a magnetic field. This action causes electric current to flow in the generator at a pressure or voltage. The power which was originally present in the water is now electric power, but this power can only be generated if current from the generator is allowed to flow away through the electric circuit. This involves a transmission line leading to the consumers through transformers, and each consumer converts the electric energy into some other form of energy suitable to his needs, as heat for cooking, or mechanical energy for motors, or for electro-chemical processes, or in some other way. The electric generator cannot function to produce or generate or transfer energy except as the consumer is ,at the same time, conversely converting the energy into some other form than electrical at his end of the circuit. The generator and consuming device are inherently and essentially dependent on one another just as though they were geared together. The velocity with which electric power is transmitted is practically that of light, that is, 186,000 miles a second. The transmission from all practical points of view must be considered as instantaneous, so that the generation and consumption of power occur simultaneously.

Dr. Magnusson, for the respondents, corroborates the appellant's witnesses. He says (R. 203, 204):

The source of energy which is transferred by an electric system is in nature already existing external to the system. The system is interposed for the purpose of "transferring and converting" this energy from its source to the place where it may be usefully put to work; to convert it to facilitate transfer and use. What the consumer uses in his appliance is energy, in the case of light it is heat energy; of a motor, mechanical energy; in some cases, chemical energy, etc. "The principle of the conservation of energy is the fundamental assumption and the basis upon which the argument rests". "Electric energy is the connecting link or chain by which energy can be economically transmitted and effectively controlled".

> "In commercial systems the transmission line is not an independent unit, but merely a link between the generator and load circuits. Step-up and step-down transformers, generators and load circuits, lightning arresters and regulating devices, and all the apparatus necessary for the operation of the system are electrically interconnected into one unit" (R. 204).

The generator commences to perform its functions commercially after consumers are connected with the system. It is then controlled through a system of well conceived regulating devices.

> "The consumers' load actuates the controlling devices and they control the generator and the turbine.
>
> Consumers' devices at one end and generator at the other end must operate substantially integrally and synchronously in point of time to produce the desired result" (R. 204).

A generator does not create electric energy. Generation does not mean creation. It does generate voltage, and using the term in that sense, it becomes largely a matter of definition what is meant by "generate". But it does not create electric energy (R. 206).

From the foregoing it becomes apparent that the function of the so-called producer or manufacturer of electric energy is simply this—he provides an electro-magnetic path over which in conjunction with the consumer he transfers energy. As Dr. Langmuir says (R. 142):

> "The responsibility of the producer of power involves the maintenance of reasonably constant voltage and frequency at the point of connection with the consumer's circuits. To guarantee that this can be done involves the maintenance of generating, transmitting, and distributing equipment sufficient to meet the maximum demand which a consumer may require. That is, the power producing company must maintain constant voltage and frequency if and when the consumer draws the maximum amount of power that he is permitted to draw under the agreement with the company."

And this summary is acceded to by Dr. Magnusson, who says that the satisfaction of the consumer's demands rests with him, and the impulses set up by him, as closing a switch without interference by the company, as soon as the automatic regulating devices function in their proper manner. "That is, if the company maintains voltage and frequency, then it is up to the consumer to get his energy" (R. 207).

This scientific statement is confirmed by the actual practice of the appellant in its contracts which, as read into the record by Mr. Gadsby (R. 176-179) show that the company's obligations are to connect its lines to a point of contact with the consumers' similar lines and apparatus, and having done that, to maintain specified voltage and frequency. It is not to deliver to him a manufactured product or commodity, but to maintain a transportation circuit by which the consumer may draw energy directly from its source when and as required and without other act or interference by the company.

As said by Mr. Peek, and confirmed by Dr. Langmuir, as above quoted:

> "* * * the control and initiation of power rests at the load. Power cannot be transferred through a gener-

ator unless it is initiated by a load" (R. 186). The generator merely creates "a certain state of the electrical medium whereby it becomes possible for electricity that is already dormant to get into circulation and whereby it becomes possible for a useful load to draw energy from a distant waterfall" (R. 187).

In brief, a generating station does not generate or otherwise produce either electricity, electric current or electric energy. It generates or creates an electric pressure or voltage which, given an outlet through the system including the consuming devices attached to it, causes electricity to be set in motion; that is, an electric current to flow. This causes the *energy* previously present in its natural source, to flow if, as and when the consumer requires it, and by his act initiates the transfer.

Energy is drawn directly from its source, and not stored in the system:

This transfer, as shown by all the witnesses, is direct from the source of the energy. It is not from energy stored in the system either at the consumer's place of use or some intermediate point.

Mr. Peek says (R. 186):

"In a circuit that is alive with voltage or tension but otherwise inactive, with no power flowing, power flow is initiated at a load point, not at a generating point. For instance, when an electric lamp is turned on, an influence corresponding to demand for electric power appears instantly at its terminal and extends to the generating station. * * * Power cannot be transferred through a generator unless it is initiated by a load."

Dr. Langmuir says (R. 131):

"There is no practical way to store any appreciable amount of electrical power in an AC [alternating current] system. Storage batteries are charged with direct

current and the power of the direct current is transformed into chemical energy which later can be converted by the storage back into direct current electrical energy. * * * This is a storage of power, but not electrical power.

Dr. Millikan says (R. 113):

"What is actually done (in the storage battery) is to transfer electrical energy into the energy of chemical separation. Later when that storage battery is discharged the process is again a transfer from chemical energy into electrical energy. Even that kind of use, which is sometimes called storage, is not possible with an alternating current system, at least commercially. * * *

(R. 114):

"* * * the electrical system differs from a water main or gas pipe system with storage facilities from which the consumer may draw water or gas for a prolonged period from what is already in the main or pipe system. As I have already said in effect, the electrical system—that is the generators, lines and transformers—does not operate as a storage battery but as a device for the immediate transference of energy from its source in nature to its point of use when, as and if the consumer required it."

Dr. Magnusson confirms this in testifying to the synchronous and instantaneous transference of energy from generator to consumer (R. 204).

Reference is made both by Dr. Langmuir (R. 131), and Dr. Magnusson (R. 203, 207) to the minute storage which takes place in condensers and capacitors, but both agree that this storage (which accumulates and discharges 120 times a second) is negligible from the standpoint of storage accumulation. The function of these appliances is not to store energy as such but "to insure economical operation."

Function of transformers:

The function of transformers is described by Messrs. Millikan, Langmuir and Cheever. They show that they are gear-

ing devices to accomplish more efficient transfer of energy, like the gears in an automobile, or a series of belts with counter-shafts (R. 115, 116, 127, 148, 149).

In view of the error into which we think the South Carolina court fell, which we shall hereafter discuss, as to the scientific or technical function of transformers, we call particular attention to the testimony of Mr. Peek, the author of the article in the Encyclopedia Brittannica, on which that court based its decision. He says (R. 187, 188):

> "An electrical state is characterized with voltage and current. Different types of circuits require different values of voltage and current. Transformers are electrical links, making it possible to connect circuits of different voltage and current with each other. The real reason for using a transformer is an economic one; that is, they are not a necessity.
>
> A transformer consists of two or more windings coupled by a magnetic core, and insulated by a strong dielectric. The current and voltage of each winding are separate from those of the other winding or windings, but, by virtue of their coupling, current and voltage in one winding are said to induce corresponding current and voltage in another winding. Thus, if the switch of a load is closed, permitting a current to circulate in it and the transformer winding connected to it, this current induces a corresponding current in the winding connected to the generator, and a current flows through the generator.
>
> Insulation which separates the windings connecting the generator and load, respectively, is completely permeated by the intense electric and magnetic lines of force. Power entering one winding passes into this insulation through electro-magnetic fields, then into the other winding, and from it to the connected apparatus. *It is important to realize that although electric current cannot flow through the insulation of a transformer, electrical energy does flow right through it with perfect ease.* An analogy may be helpful. The walls of the tubes of a boiler in a power house segregate or insulate the water and steam from the coal and its flames and smoke. But the heat energy of the burning coal passes readily right through the walls of the tubes to the water.

The role which a transformer plays is similar to that of a set of reduction gears. Each gear has its own rotation (corresponding to electric circuits) separate from those of the other gears. Each gear has a different velocity (corresponding to current) and pressure (corresponding to tension) from those of the other gear. But energy flows from gear to gear without a break or gap in its path.

A transformer then transforms current and voltage, not power or energy. The latter flows right through its insulation without alteration."

Dr. Magnusson, for the respondents, does not disagree with, but confirms, this statement. He describes the transformer and its functions in much the same way as does Mr. Peek (R. 201, 202).

On cross-examination (R. 204) he confirms the statement in one of his books that "step-up and step-down transformers, generators and load circuits, lightning arresters and regulating devices, and all the apparatus necessary for the operation of the system are electrically inter-connected into one unit."

Further (R. 206) he says:

> "Energy passes directly from its source through these appliances, notwithstanding the interposition of transformers or anything else, direct to its destination"

Mr. Rupp, for the respondents, says (R. 214):

> "Q. You likened the transformer to a generator in certain respects in that, I believe, lines of force are cut in the transformer. That also is true in the motor?
>
> A. That is correct, and, in fact, this path for the transfer of electric energy, is not only electrical but also magnetic.
>
> And through the gaps of the transformer and the motor the energy travels in what we may term an electro-magnetic path."

In other words, the transformer acts (as do the generator and the motor) as a magnetic link in the electro-

magnetic path established for the transfer or flow of energy, and the energy flows directly through such path notwithstanding the interposition of transformers which vary inversely the current and the voltage, so that the same energy may be transferred more efficiently. It is the energy and not the current or the voltage which the consumer wants, and for which he is paying, and which is taxed by the Act under consideration.

Losses, or system uses:

The presence of the so-called losses in the system on account of which more energy leaves the generator than is delivered to the consumer, does not alter the fundamental nature of the process nor indicate any difference in the function of the generator than as above described. The system itself is a consuming device to the extent that it requires the transfer of certain energy from the source to enable the system to transfer energy to the consumer; to keep it electrically alive. They are system uses but are losses in a commercial sense because they are not specifically measured or billed to the consumer as part of the service to him. We do not quote all the witnesses specifically on this subject. It will be enough to quote from Dr. Langmuir for the appellant (R. 128, 129) and the respondents' witness, Dr. Magnusson (R. 201-205) as follows:

Dr. Langmuir says:

> "In order to maintain the whole electrical system in operating condition, it is necessary, for example, that the field coils of the generator shall be continuously excited. * * * Similarly, the action of the transformer requires that the iron of the transformer shall be magnetized. To maintain these magnetic fields requires the expenditure of * * * a relatively small fraction to the whole energy which is transmitted or generated.
>
> In a similar way to transmit electrical power over a transmission line requires the expenditure of a certain amount of electrical energy. There is, so to speak, a certain electrical friction when a current passes through

a wire. In order to maintain the flow of current, it is therefore necessary to have a certain electrical pressure to maintain this flow. This involves the expenditure of a certain amount of electrical power. This is really the use of electrical power for the purpose of transmitting the power over the line. It is usually referred to as a loss because it cannot be charged for by the power company. It should, however, really be regarded not as a loss but as the expenditure of electrical energy for the purpose of transmitting power over the line.

It is entirely analogous to the coal that would be consumed in a locomotive of a train which hauls coal from a mine to a distant point where the coal is consumed. The coal in the locomotive must be expended for the purpose of transporting the large amount of coal carried by the train."

Dr. Magnusson says:

"A. In any system, there are some losses. There are system losses, hysteresis losses, and so forth, corresponding and quite similar to friction losses in a mechanical machine.

These losses in the generator—the friction of the bearings, those due to magnetic hysteresis, and what is called copper losses, due to the resistance in the conductors."

(R. 204, 205):

"With respect to the uses or losses in the system, it is true that the system itself impresses on the generators a demand similar, so far as the generators are concerned, to the demands of consumers to satisfy these uses or losses.

And the generator, if you can imagine it as a sentient being, does not distinguish in performing its functions between the load that is created by the consumer and the load that is created by these so-called losses."

The kilowatt hour as a measure of use, and as energy in commerce:

As previously shown, Dr. Millikan defines the kilowatt hour as "a mathematical product of the power relation in the

electrical circuit between the generator and a receiving device" measured in kilowatts and hours. It is a measure of the relationship in power demand (kilowatts) between the consuming device and the generating station, and the duration in time of that relationship. It thus measures the magnitude of the demand made by the consumer on the electrical vehicle for the transfer of energy to him, and of the length of time during which that demand continues. *In short, in its very essence, it is a measurement of commerce in electric energy.*

Energy, as measured by kilowatt hours, is in commerce; that is, in the course of transfer from producer to consumer at the time of its measurement in kilowatt hours. This follows not only from the rate of speed at which the entire electric process functions (186,000 miles per second), but because of the very nature of the electric process, and the interdependence of the generator, transmission line and consuming device. The following are brief excerpts from the testimony:

Dr. Millikan says (R. 111):

> "It is not possible to have a measurable kilowatt hour generated except as we have that kilowatt hour used somewhere in the system attached to the generator.
>
> It is not possible to measure a kilowatt hour at any point in the electric circuit except as, if and when electric power is already in process of transference, and as we say, flowing over the wire."

Expressed somewhat differently, but to the same effect, Dr. Langmuir says (R. 133, 134, 136):

> "Since the kilowatt is a measure of power it is equivalent to mechanical power which is usually measured in horsepower. I say 'equivalent' in the sense that one can be converted into the other. However, the units are somewhat different so that actually a kilowatt is equivalent to about one and one-third horsepower of mechanical energy.
>
> Power measures the rate of doing work. Naturally, a consumer must pay not for the rate at which it does work, but the total amount of work done. That is, the

longer the time interval during which power is consumed, the greater amount he must pay. Therefore, as a practical unit of charge to measure the energy consumed, the kilowatt hour is adopted. If one kilowatt is consumed for one hour, this means that one kilowatt hour has been consumed. Or we might have one-half kilowatt for two hours, which would also be one kilowatt hour. In other words, the kilowatt hours represent the product of the time by the kilowatts.

You cannot measure a kilowatt hour at the generator or anywhere else upon the system except if, as, and when that kilowatt hour is delivered to and used by the consumer. * * *

At the generator the meters which measure kilowatt hours would show the total kilowatt hours consumed in the entire lines which would include the so-called losses along the line. But so far as kilowatt hours generated in response to consumers' demands are concerned they can be measured only if, as, and when they are actually demanded and consumed. The measurement is in kilowatt hours and that involves the measurement of current in amperes, voltage and time. It is the product of these three that determines the power consumed.

As I said before, no current can flow in one part of the system without involving current flow through other parts of the system. The recording of the kilowatt hours on the meter at the generator station is thus simultaneous with the consumption of the power at the other points along the line beyond the generating station. This is necessarily the case because there is no storage of electricity.

* * * * * *

Q. Assume that a power station is located in one State, that a transmission line extends directly from that station across the State line into another State, and that at the terminus of that transmission line there is a consumer who uses the power output of the station. Can any power be generated by that station in the first State other than again is required to keep the system under rotation and in charge except in response to and simultaneous with a demand and use by the consumer in the second State?

A. No. * * *

> The amount of power generated by the station in the first State is always equal to the amount consumed by the consumers in the second State, again allowing for the so-called system uses.
>
> It is not possible to measure a kilowatt hour of electricity or electrical energy at the generating station in the first State except if, as, and when that kilowatt hour is also passing over that State line and being delivered to and used by the consumer in the second State.

These statements are confirmed by Dr. Magnusson for the respondents, as follows (R. 205):

> "Meters at the generating station, or what the statute which we are considering in this case calls 'The place of production' are placed outside the generators, and that is the first place at which the energy transferred through the generators may be measured.
>
> While possibly for laboratory purposes you might measure it somewhere else, yet commercially it cannot be measured until that time.
>
> With respect to that energy which reaches the consumers, it is all in course of transit to consumers or, in fact, is being simultaneously, for practical purposes, received by them at the time of the measurements. These meters measure the energy flowing past the point at which the meter is connected. The measurement is in terms of kilowatt hours which is the unit for measuring electrical energy."

Likewise Mr. Rupp, for the respondents (R. 214), says:

> "And these meters to which we referred, measure the energy while it is in the course of such transit, and also, in fact, while it is actually being delivered to the consumer."

The Tax Act requires kilowatt hours to be measured at the place of production. The first practical point of measurement is on the cables or wires leading from the generator to the station bus, or direct to the transformers, if there be no bus.

As shown by the testimony previously discussed energy is transferred through the generator from the water fall, only in response to the consumer's demand and the demand of the

system itself for system uses. The amount so transferred is measured by this demand and becomes energy measurable in kilowatt hours only as the demand continues. The measurement takes place simultaneously with use and with the intervening transmission. It is implicit in the very nature of the process that energy measured in kilowatt hours, is in commerce when the measurement takes place. Therefore, the tax has its incidence after commerce has commenced, during the course of such commerce, and is measured by the amount of the commerce done.

Appellant's electric system operates in interstate commerce:

The argument thus far has been directed to the establishment of the fundamental proposition that the so-called generation of electric energy is an integral and inseparable part of the transfer of energy which constitutes commerce as distinguished from manufacture or production. If this commerce is carried on entirely within a state it is intrastate commerce; if carried on entirely between two states, interstate commerce, and if carried on in part within and in part without the state of origin it is intrastate commerce as to that part completed within the state, and interstate as to that part which requires integral and simultaneous action in two separate states to complete the process.

If this argument be accepted, we think it will not be disputed that the major part of appellant's operations constitute interstate commerce. These operations are described and the scientific testimony applied thereto in the testimony of Mr. Cheever, and of Messrs. Hale, Chief Engineer, and Gadsby, President of appellant company (R. 143, 157, 176).

No purpose would be served by quoting or narrating the testimony in detail. A diagrammatic map of the system is contained in R. 156. Briefly summarized, the testimony discloses the following:

The major part of the appellants' system in Idaho referred to as the "Bear River System" was constructed exclusively

and has always been used primarily for Utah service. This system consists of four hydro-electric plants on the Bear River in Idaho, with the Bear Lake Reservoir in the upper reaches of the river for the purpose of regulating the flow of the stream, connected to a central sub-station near Salt Lake City, Utah, designated "Terminal" by three circuits of 130,000 volt transmission lines, and to a point near Logan City, Utah, by a 44,000 volt transmission line. While interconnections of this system have been made with smaller Idaho plants and distributing centers, this inter-connection has been secondary for the purpose of securing efficient and reliable service and the interchange of power and energy between the other Idaho plants and those of the Bear River System. The smaller Idaho plants are of capacity adequate to and normally do carry the entire Idaho load. Upwards of 98% of the energy of the Bear River plants is transmitted to Utah. The 130,000 volt lines over which the larger part of this energy is transmitted have no taps for Idaho service. The 44,000 volt line has one tap in Idaho for such service (R. 145-148, 163).

The commercial operations of appellant conform to the physical situation. The appellant has in Utah an inter-connected network of local plants, transmission and distributing lines which are directly or indirectly connected to Terminal sub-station. The power or energy originating on this part of the system is utilized in Utah service and in the aggregate is insufficient to supply such service. Consequently the residual load or demand of the Utah consumers impresses itself in the aggregate on the appellant's Idaho system, particularly the Bear River System by way of Terminal sub-station. Power or energy is "generated", or more accurately transferred, from the source at the Bear River stations in Idaho instantaneously in response to the aggregate consumers' demand expressed in Utah, communicated to the Bear River stations by way of Terminal. The system is under the control of a Dispatcher, but his function is limited to seeing that the system is maintained in readiness to respond to the consumers' demands. He does not "switch" the power or energy at Terminal from one consumer to an-

other. He merely directs the station operators to hold certain generators at the stations in readiness to anticipate the consumers' demands as they are automatically reflected in the system (R. 147-148, 152, 165-166, 172).

The appellant's contract with its consumers obligates the appellant to connect its lines and facilities to those of the consumer and to maintain voltage and frequency at the point of delivery. In other words, the company agrees to and does maintain the facilities by which the consumer may at his will procure the transfer of power and energy from its source for his use. Such power and energy so far as it may originate at a source in Idaho is transferred directly to the consumer by means of the facilities furnished by the company. The function of the company is to furnish a vehicle of transfer, and to so maintain it in operation that the consumer may accomplish the transfer if, as and when he requires it (R. 178-179).

The interstate transfer of energy over the appellant's system is at the rate of approximately 200,000,000 kilowatt hours per year and upwards (R. 67). The tax amounts to from approximately $100,000 per year upward (R. 68, 88). The burden of the tax is approximately 3.58 per cent of the gross sales value of the kilowatt hours delivered (R. 180).

Discussion of authorities:

The transmission and sale of electric energy across state lines is interstate commerce. *Public Utilities Commission of Rhode Island* v. *Attleboro Steam & Electric Company*, 273 U. S. 83.

In this case the court held that the Public Utilities Commission of Rhode Island could not regulate the rates to be charged for energy sold and delivered to another company for distribution in Massachusetts, because the transmission of such energy from one state to another is interstate commerce. In its opinion the court says (p. 90):

> "Plainly, however, the paramount interest in the interstate business carried on between the two companies is not local to either State, but is essentially national in

character. The rate is therefore not subject to regulation by either of the two States in the guise of protection to their respective local interests * * *."

If the regulation of the rates for which electric energy can be sold to a company distributing such energy in another state burdens interstate commerce, it must follow that the imposition of a tax upon the process which transmits that energy likewise burdens such commerce.

The commercial business of the appellant therefore in transmitting electric energy across the Idaho-Utah line to its "Terminal" substation for sale in Utah is interstate commerce. Whether such commerce extends beyond such substation is not involved in this case. There the demands of the Utah consumers, remaining unsatisfied after exhaustion of the energy supplied through the Utah generators, impress themselves as a consolidated aggregate demand on the appellant's Idaho generators. That the interstate business includes as an integral and inseparable part thereof, as distinguished from a prior and separable incident, the transfer of the energy from the stream through the generator and to the transmission line is established by the facts above discussed.

In *Idaho Power Company* v. *Thompson,* 19 Fed. (2nd) 547, a rate case, the question was raised of inclusion in the rate base of the cost of a generating unit constructed by the Idaho Power Company at American Falls for serving Utah Power & Light Company and of inclusion within the revenues of the Idaho Power Company from Idaho business of the money received by the Idaho Company from the Utah Company under the service contract. Separate opinions were written by Judge Dietrich (concurred in by Judge Rudkin) and by Judge Cushman. The latter opinion, however, was adopted as the opinion of the court. In that opinion (p. 586) Judge Cushman said:

"As pointed out, the majority of the court excluded from the rate base the cost of the unit constructed at American Falls for serving the Utah Power & Light

Company, but have allowed as an item of revenue of the amount received upon the contract with this Company $22,000.00 per annum. I am unable to agree to the inclusion in the revenue of plaintiff's any part of its receipts from this contract, because supplying the Utah company over the lines of the two companies with electric power at Salt Lake City is interstate commerce. No question is made but that power directly delivered from one state to another constitutes interstate commerce. It is difficult to conceive of anything passing more directly to its destination than electric power."

The tax imposed by the Tax Act under review is a license tax exacted of appellant as a condition of continuing its business. The title of the Act so describes it. It is made payable monthly. Failure to pay it subjects the so-called producer to treble damages and injunction restraining further production of electric energy until it is paid. It is for revenue and not for regulation as the amount therefor is substantial (as applied to appellant upwards of $100,000 per year) and the taxes collected under the Act reduce the general *ad valorem* state taxes to all tax payers. It is measured by the amount of business done including the interstate business. It is similar in this respect to a tax on gross receipts, or on the tonnage of freight, the head of passengers, the tonnage of vessels, or on telephone or telegraph messages as such. If it be regarded as a tax on the kilowatt hour as property, it violates Sections 2 and 5 of Article VII of the Constitution of the State of Idaho in that it is not levied according to valuation, and is not uniform upon the same class of subjects, but is fixed arbitrarily. *Northern Pacific Ry. Co.* v. *Gifford,* 25 Idaho 196.

As thus applied to interstate business the tax falls within the condemnation of the decisions of this Court. In *Postal Telegraph Cable Company* v. *Adams,* 155 U. S. 688, the court, speaking by Mr. Chief Justice Fuller, said (pp. 695-6):

"It is settled that where by way of duties laid on the transportation of the subjects of interstate commerce, or on the receipts derived therefrom, or on the occupation

> or business of carrying it on, a tax is levied by a State on interstate commerce, such taxation amounts to a regulation of such commerce and cannot be sustained."

In this case the court sustained a tax on the property of the telegraph company measured by its mileage within the State and said:

> "Doubtless, no State could add to the taxation of property according to the rule of ordinary property taxation, the burden of a license or other tax on the privilege of using, constructing, or operating an instrumentality of interstate or international commerce or for the carrying on of such commerce; but the value of property results from the use to which it is put and varies with the profitableness of that use, and by whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the Constitution."

But the tax here involved is not a tax on property or in lieu of a tax on property. It is expressly in addition to all other taxes, and, as above shown, is in form a license tax for the privilege of conducting the business of appellant, being assessed without reference to value, and at a unit rate upon the commerce which flows from the use of the property. It is similar to a tax on the ton of freight considered in the *State Freight Taxes,* 15 Wall. (U. S.) 232, or upon the passengers carried as in the *Passenger Case;* 7 How. (U. S.) 283, or on the tonnage of vessels as in the *State Tonnage Cases,* 12 Wall. (U. S.) 204. In these cases, and all similar ones, a tax at the unit rate on transactions in commerce was held to be a tax on the unit,—a burden on the commerce,—and not sustainable as a tax on the privilege or franchise of conducting the business within the state.

In *Telegraph Co.* v. *Texas,* 105 U. S. 460, the court held that a tax of one cent on each telegraph message originating within the State of Texas could not be enforced as to those messages with a destination outside of the state, because such tax burdened interstate commerce. In discussing the

transmission by telegraph, after citing the State Freight Tax, Tonnage, Passenger, and similar cases, the court said (pp. 465-466):

> "The tax is the same on every message sent, and because it is sent, without regard to the distance carried or the price charged. It is in no respect proportionate according to the business done. If the message is sent the tax must be paid, and the amount determined solely by the class to which it belongs. If it is full rate, the tax is one cent, and if less than full rate, one-half cent. Clearly if a fixed tax for every two thousand pounds of freight carried is a tax on the freight, or for every measured ton of a vessel a tax on tonnage, or for every passenger carried a tax on the passenger, or for the sale of goods a tax on the goods, this must be a tax on the messages. As such, so far as it operates on private messages sent out of the State, it is a regulation of foreign and interstate commerce and beyond the power of the State. That is fully established by the cases already cited."

Similarly the tax on the kilowatt hour entering into commerce is a tax on the commerce, as is the tax on the message, the freight, the passenger, or the tonnage.

In *LeLoup* v. *Port of Mobile*, 127 U. S. 640, the court held void a city license tax upon telegraph companies doing business within the city which was based in part upon messages passing in interstate commerce. See also to the same effect *Western Union Telegraph Company* v. *Alabama*, 132 U. S. 472.

While the Act by its terms attempts to levy a tax upon "electric energy generated, manufactured or produced," it has been repeatedly held that neither the form of the Act, nor the manner in which it is construed or characterized, are determinative of whether or not the same burdens interstate commerce. The practical operation and effect of the Act govern. *Foster Packing Co.* v. *Haydel, infra,* and cases therein cited.

The Tax Act describes the process as "generation, manufacture or production", but as shown by the testimony, elec-

tric energy cannot be generated, manufactured or produced except as it is transmitted and used. Generation, transmission and use occur simultaneously and are interdependent. No one can exist without the other. That part of the process which is described as generation is the part which is responsible for and causes the movement of the energy. It is the operation of the generator which causes the electric energy to travel in commerce. The generator is therefore an instrumentality of commerce. The generator cannot function unless it is connected to transmission lines over which energy may flow from it to other appliances by which the energy may be used. The tax on generation is necessarily a tax on transmission and on use. They are inseparable. What burdens one part of the process burdens the whole. Certainly if this tax by its terms were on kilowatt hours transmitted it could not be sustained as to energy transmitted in commerce and yet that is exactly what this tax is. It is this inseparability (which is not merely accidental or contrived for commercial facility or convenience but is inherent and integral) which characterizes the entire process as commerce. In *Foster Packing Company* v. *Haydel*, 278 U. S. 1, the court, through Mr. Justice Butler, said (p. 10):

> "One challenging the validity of a state enactment on the ground that it is repugnant to the commerce clause is not necessarily bound by the legislative declarations of purpose. It is open to him to show that in their practical operation its provisions directly burden or destroy interstate commerce. *Minnesota* v. *Barber*, 136 U. S. 313, 319. *Brimmer* v. *Rebman*, 138 U. S. 78, 81. In determining what is interstate commerce, courts look to practical considerations and the established course of business. *Swift and Co.* v. *United States*, 196 U. S. 375, 398. *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50, 59. *Binderup* v. *Pathe Exchange*, 263 U. S. 291, 309. *Shafer* v. *Farmers Grain Co.*, 268 U. S. 189, 198, 200. Interstate commerce includes more than transportation; it embraces all the component parts of commercial intercourse among States. And a state statute that operates directly to burden any of its essential elements is invalid."

If an injunction were granted to restrain "production", for non-payment of the tax as provided in section 8 of the Act, it would immediately and necessarily stop transmission to Utah, and use in Utah; the consumer's motors would cease to operate with the generator. The entire system would be dead. In other words the tax must be paid or commerce ceases. This concert of action between instrumentalities in different states required to produce the result is the basis of the recent decisions of the lower Federal Courts in the *Radio* cases.

In the case of *Station WBT* v. *Poulnot,* 46 Fed. (2nd) 671, the State of South Carolina attempted to levy a license tax on radio receiving sets. The court said (pp. 675-6):

> "In other words, the receiving sets are absolutely essential instrumentalities of the interstate commerce in which the plaintiff is engaged. * * *
>
> "The tax in question cannot be sustained under those cases which hold that the state has a right to impose an *ordinary* property tax upon property having a situs within its territory and employed in interstate commerce; for here the tax is not a general property tax, but a license tax for the privilege of using an instrument of interstate commerce. Nor can it be sustained as a matter of local regulation, for the subject is national, and admits only of one uniform system or plan of regulation. Nor can it be sustained as a police regulation with an incidental tax to pay the expenses of the regulation, for it has no elements of police, and, moreover, the tax is frankly devoted to the uses of a state institution. Nor can it be sustained as in aid of interstate commerce, nor on the ground that its effect is merely incidental. The tax here is directly laid upon a necessary instrument of interstate commerce, imposes a burden upon that commerce, and the act of the Legislature imposing it is therefore in conflict with the Constitution of the United States, and null and void."

In *United States* v. *American B. & M. Co.,* 31 Fed. (2nd) 448, the power of the Federal Radio Commission was challenged on the ground that it attempted to interfere with

private business, touching subjects not within interstate commerce. The act was sustained and the court held that both broadcasting and reception are interstate commerce. The court said (p. 454):

> "It does not seem to be open to question that radio transmission and reception among the states are interstate commerce. To be sure it is a new species of commerce. Nothing visible and tangible is transported. There is not even a wire over which 'ideas, wishes, orders, and intelligence' are carried. A device in one state produces energy which reaches every part, however small, of the space affected by its power. Other devices in that space respond to the energy thus transmitted. The joint action of the transmitter owned by one person and the receiver owned by another is essential to the result. But that result is the transmission of intelligence, ideas, and entertainment. It is intercourse, and that intercourse is commerce (citing cases)."

See also

> *Whitehurst* v. *Grimes*, 21 Fed. (2nd) 787;
> *Technical Radio Laboratory* v. *Federal Radio Commission* (App. D. C. 1929), 36 Fed. (2nd) 111.

A license tax upon telephone systems based upon gross receipts has been held void under the commerce clause if receipts from interstate business were attempted to be subjected to the tax.

In New Jersey Bell Telephone Company v. *State Board of Taxes etc.*, 280 U. S. 338, the state of New Jersey attempted to levy a tax against telephone and telegraph companies measured by the "gross receipts of their business in the state for the calendar year next preceding." It was urged by the State of New Jersey that this exaction was a franchise tax on intangible property and was justified as an exchange for the right which the company had of eminent domain and to occupy the streets and enjoy a regulated monopoly. The telephone company insisted that it was a license tax levied directly upon gross receipts from interstate as well as intra-

state commerce in addition to *ad valorem* taxes upon its real and personal property, and, therefore, repugnant to the commerce clause. The court, after holding that if the act burdens interstate commerce it is void, irrespective of the name given the act or the manner in which this burden is imposed, calls attention to the fact that the act under consideration was not for a police regulation nor exacted as a tax on property, neither was it that of a "proprietor demanding compensation for the use of its property, but as a sovereign imposing a tax for the support of government."

The court further said (p. 346):

> "* * * a State may not tax, burden or interfere with such commerce or tax as such gross earnings derived therefrom or impose a license fee or other burden upon the occupation or the privilege of carrying on such commerce, whatever may be the instrumentalities or means employed to that end."

And that (p. 349):

> "We think it very plain that the exaction is not a tax on property nor in substitution for or in lieu of a property tax. Within the rule heretofore applied in this Court the exaction is a direct tax on gross receipts derived from appellant's interstate commerce and, as to that part at least, is void." (Citing cases.)

A tax on the operation of motor vehicles which is intended for revenue and not as a police regulation or as compensation for the use of the highways is void as applied to vehicles operating in interstate commerce. Nor can it be sustained as an occupation tax when it does not appear "that it is imposed solely on account of the intrastate business; that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the imposition; and that the person taxed could discontinue the intrastate business without withdrawing also from the interstate business". *Sprout* v. *City of South Bend*, 277 U. S. 163, 171. Similarly

a mercantile license tax on a wholesale vendor of goods is void insofar as it is measured by a percentage of gross transactions in foreign commerce. *Crew Levick Co.* v. *Pennsylvania,* 245 U. S. 292.

In *Helson* v. *Kentucky,* 279 U. S. 245, it was held that a Kentucky tax upon gasoline sold or used within the state was void in so far as it applied to gasoline purchased in Illinois and used in Kentucky by a ferry boat operating between the two states. The court held that the boat was engaged in interstate commerce, that the gasoline which was used in carrying on the commerce was an instrumentality of interstate commerce, and that a tax on the use of the gasoline was a tax upon the commerce. After referring to numerous decisions, the court said through Mr. Justice Sutherland, at page 252:

> "The statute here assailed clearly comes within the principle of these and numerous other decisions of like character which might be added. The tax is exacted as the price of the privilege of using an instrumentality of interstate commerce. It reasonably cannot be distinguished from a tax for using a locomotive or a car employed in such commerce. A tax laid upon the use of the ferry boat, would present an exact parallel. And is not the fuel consumed in propelling the boat an instrumentality of commerce no less than the boat itself? A tax, which falls directly upon the use of one of the means by which commerce is carried on, directly burdens that commerce. If a tax cannot be laid by a state upon the interstate transportation of the subjects of commerce, as this Court definitely has held, it is little more than repetition to say that such a tax cannot be laid upon the use of a medium by which such transportation is effected. 'All restraints by exactions in the form of taxes upon such transportation, or upon acts necessary to its completion, are so many invasions of the exclusive power of Congress to regulate that portion of commerce between the States.'. *Gloucester Ferry Co.* v. *Pennsylvania, supra,* p. 214."

So, if this tax is attempted to be sustained as a tax for the privilege of using the generator, it becomes a tax "upon the use of one of the means by which commerce is carried on" and directly burdens that commerce. Viewed in that aspect, the generator is clearly an instrumentality of commerce and the tax is on the use of one of the means of conducting it.

Furthermore, the tax involved in this case falls, and has its incidence, after the energy has entered upon its interstate journey, and is measured by the amount of energy (kilowatt hours) actually in commerce. All the witnesses agree that the energy cannot be measured in kilowatt hours until it has left the generator and is on the way to the station bus, at which time it has already commenced its journey in commerce and is in fact being delivered to the user. It has been held, even as to natural or manufactured products susceptible to tax by the State before entering commerce, that such a tax imposed on the thing in commerce after commerce has commenced is void.

In *Eureka Pipe Line Company* v. *Hallanan*, 257 U. S. 265, and *United Fuel Gas Co.* v. *Hallanan*, 257 U. S. 277, oil and gas respectively in interstate pipe lines was held not subject to a state license tax based on a unit rate per barrel, or per thousand cubic feet insofar as such oil and gas were actually destined for points beyond the state. The oil and gas were held to be in interstate commerce from the commencement of the flow even though there were some local deliveries from the lines, and it was theoretically possible that the owners might change the destination of any of such oil or gas before it left the state. Even this theoretical possibility is not here present.

The principle governing these cases is clearly stated in the logging cases: *Coe* v. *Errol*, 116 U. S. 517; *Champlain Realty Co.* v. *Town of Brattleboro*, 260 U. S. 366; *Hughes Bros. Timber Company* v. *Minnesota*, 272 U. S. 469. From these cases it is clear that while the state may impose a tax on timber cut in one state for transportation to another, yet as soon as the transportation has actually started such tax

may not be imposed even though the logs are temporarily detained by a boom to await high water, or gathered in a lake or river to be loaded on vessels. The "at rest" doctrine has no application to the facts in this case.

So in this case, energy is in commerce *before it has left the* windings of the generator where it first appears in electrical form. In fact it has reached its destination and been retransformed to some other form of energy than electrical, before the meter can possibly integrate and record the kilowatt hours "generated" and simultaneously used. The energy is not only in commerce when it is taxed, but the kilowatt hour is in itself a measure of the magnitude and duration of such commerce, and the tax is on the energy in commerce at a unit rate, and not on the value of the energy before the commerce has commenced.

The Act, in Burdening Interstate Commerce, is Void in its Entirety Because No Provision is Made For The Separate Determination of Interstate and Intrastate Business.

As previously shown (*supra,* p. 39), the Tax Act involved in this case may only be sustained as a license tax. Therefore, if the tax is a burden on interstate commerce, it is void in its entirety.

There is no segregation in the Act of interstate and intrastate business, and no way is prescribed for a determination of intrastate and interstate generation of electricity, or measurement of the kilowatt hours. It has been universally held by this Court that if the statute is inseparable by its terms and by its legal operation and effect, the tax imposed upon both intrastate and interstate business fails. In *Crew Levick Co. v. Pennsylvania,* 245 U. S. 292, on page 297, the court, in discussing such a tax, says:

> "It operates to lay a direct burden upon every transaction in commerce by withholding, for the use of the State, a part of every dollar received in such transactions. That it applies to internal as well as to foreign commerce can-

not save it; for, as was said in case of State Freight Tax, 15 Wall. 232, 277, 'The State may tax its internal commerce, but if an act to tax interstate or foreign commerce is unconstitutional, it is not cured by including in its provisions subjects within the domain of the State.' That portion of the tax which is measured by the receipts from foreign commerce necessarily varies in proportion to the volume of that commerce, and hence a direct burden upon it."

The entire Act was held invalid.

In *Bowman* v. *Continental Oil Company*, 256 U. S. 642, the court held an act unconstitutional in so far as it interfered with interstate commerce, and declared the entire license tax void both as to intrastate and interstate business. On page 647, the court says:

"But with the license tax it is otherwise. If the statute is inseparable, then both by its terms and by its legal operation and effect this tax is imposed generally upon the entire business conducted, including interstate commerce as well as domestic; and the tax is void under the authority of *Leloup* vs. *Port of Mobile*, 127 U. S. 640, 647; *Crutcher* vs. *Kentucky*, 141 U. S. 47, 58-59; *Williams* vs. *Talladega*, 226 U. S. 404, 419; and other cases of that character."

If, in the case at bar, provision had been made, or were possible consistent with the terms of the Act, for determination of generation in intra-state commerce, as distinguished from inter-state, the case would have been different. In this respect also, the case is different from *Telegraph Co.* v. *Texas, supra*, wherein the court held the tax void on messages originating within the State of Texas for delivery in another state, while valid on that business done within the state. There again it is to be observed the Act was separable and the amount of the tax on the intrastate business could be determined with precision.

The Tax Act provides for an injunction against one "producing" electricity and electrical energy if he fails to pay the

tax. This feature of the Act is determinative of its inseparability. It clearly indicates that it was the intention of the Legislature which passed the Act to have it considered as a whole. It was held in *Leloup* v. *Port of Mobile,* 127 U. S. 640, that a general license tax on a telegraph company affects its entire business, interstate as well as domestic or internal, and is unconstitutional.

On page 647 the court says:

> "But it is urged that a portion of the telegraph company's business is internal to the State of Alabama, and therefore taxable by the State. But that fact does not remove the difficulty. The tax affects the whole business without discrimination. There are sufficient modes in which the internal business, if not already taxed in some other way, may be subjected to taxation, without the imposition of a tax which covers the entire operations of the company."

Many other cases, including *United States* v. *Reese,* 92 U. S. 214; *Allen* v. *Louisiana,* 103 U. S. 80; *Pollock* v. *Farmers Loan & Trust Co.,* 158 U. S. 601; *International Textbook Company* v. *Pigg,* 217 U. S. 91, announce the same doctrine, viz.: that if the act itself clearly covers interstate as well as intrastate business and is indivisible in its terms, it must stand or fall as a whole. The court cannot say, as it would have to say in this case, if it imposed the tax on intrastate business, that while the Legislature clearly intended to tax the 84 per cent of the electricity used in Utah, yet it also intended and devised some method to tax the relatively small amount used in Idaho, if the tax on the Utah use should fail. That no such result was contemplated by the Legislature is clear from reading the Tax Act.

Discussion of decision and opinion of the Statutory Court.

The theory of the court below in this case is shown by its findings, conclusions and opinion. It is as follows: The electric energy generated by the appellant in Idaho can be

measured at the various generating stations before it starts in transmission on its interstate journey to Utah and Wyoming (R. 59); that the conversion of energy to the electrical form is completed at the generator; that the kilowatt hour is a commodity which is produced in Idaho; that the transformer has the effect of changing electric energy; and that the consumer receives both electric current and electric energy (Finding of Fact V, R. 88-89). As a consequence of these views the court below held that the Tax Act in question does not burden interstate commerce (Conclusions of Law XI, R. 94). To these findings of fact and conclusions the appellant duly took exception and the appellant duly requested the court below to make findings and conclusions in accordance with its theory of the case, which we have hereinbefore set forth.

We think it will be apparent from an examination of the record that there is no evidence to support the findings and conclusions made by the court below, but that all the testimony supports without conflict the findings and conclusions requested by the appellant.

The court found with respect to the nature of the kilowatt hour (Finding of Fact V, R. 89):

> "That the kilowatt hour is a unit of measurement of a definite physical entity, and of a commercial commodity produced by plaintiff for transmission, delivery and sale to its customers * * *. It is not a measurement of a period of time nor of service."

The appellant requested a finding (Proposed Findings of Fact XV, R. 71) that:

> "The kilowatt hour, the usual unit for measuring energy in the electrical form is a mathematical product of the power relation in the electric circuit between the generating and receiving device measured in kilowatts, and the duration of time over which that relation is utilized, measured in hours."

This statement of fact which the court refused to find is compelled by the evidence in the record and there is nothing to sustain the court's contrary finding. All the evidence shows that an electric system is a vehicle for the transfer of energy and that a kilowatt hour is the measure of the use of that vehicle. It is not in itself a commodity either natural or manufactured nor is it a physical entity (Millikan, *supra*, pp. 21, 32; Langmuir, *supra*, p. 32; Magnusson, *supra*, p. 34).

The court also found (Findings of Fact V, R. 88) that:

> "The process of conversion to energy in the electrical form is completed at the generator and before the pulses of energy leave the generator in their flow to the station bus or transformer."

The testimony is to the effect that the electrical phase commences in the generator and is completed in the consumer's motor. Generator, transmission lines and motor must function integrally and synchronously as a unit to either cause or complete the process (Millikan, *supra*, pp. 21-22; Langmuir, *supra*, pp. 22-23; Magnusson, *supra*, p. 24).

The court also erred in its findings with respect to the function and operation of the transformer in an electric system. The court found (Findings of Fact V, R. 89, 90) that:

> "Because the electrical energy produced by plaintiff cannot be transmitted to Terminal station as the same electrical current and with the same voltage at which generated without a loss in transmission in the consumption by or loss of energy from the transmission line of substantially the greater part of the electrical energy generated, the transformers are interposed to produce a different current and higher voltage which may be transmitted without a similar loss or consumption. * * * The consumer receives and must receive both current and power and that the measurement of electrical power generated or delivered to the consumer is the product of current and voltage."

On the other hand the appellant requested the court to find (Proposed Findings of Fact XIX, R. 72):

> "That there is a marked distinction between electric current and electrical energy or power; that electric current is the carrier for electric power or energy; electric current is not used or consumed by the consumer, but returns again to the generator leaving behind the electric energy or power which is used or consumed by the consumer. Electric current is never bought or sold; it is the electrical energy which is purchased by the consumer."

We submit that all the evidence in the record sustains appellant's proposed findings on this point and does not sustain the findings made by the court. All the testimony of the scientists and engineers called as witnesses was to the effect that electric energy is not changed by the transformer. The function of the transformer is to induce current to flow at a higher or lower voltage, so that energy can be more economically transmitted, but the energy itself passes through the transformer uninterrupted and unchanged (Langmuir, *supra,* pp. 27-28; Peek, *supra,* pp. 28-29; Magnusson, *supra,* p. 29; Rupp, *supra,* p. 29). The consumer uses not electric current, but electric power or energy. Indeed in an alternating current system such as the appellant's the electric current flows continuously back and forth. If ammeters were placed at both ends of the consumer's motor they would show the same amount of current coming out as going in (Peek, R. 189; Rupp, R. 214). It is apparent that the findings of the court with respect to the function of transformers and the distinction between electric current and electric energy and the refusal of the court to find as requested by the appellant upon these matters is in direct conflict with all the evidence in the case.

The court held that electric energy generated by the appellant in Idaho can be measured at the generating stations before it starts in transmission on its interstate journey to Utah and Wyoming. We do not contend that electric en-

ergy cannot be measured at the generating stations. It can be and it is, But we do contend that at the time it is so measured it is actually in the process of transmission to another state. Indeed it is actually being used in another state. The court below apparently completely overlooked this distinction. The court in its opinion said (R. 59):

> "While there appear differences of opinion among the engineers and scientists as to whether the generation of electrical energy can be determined at the place of production and before it reaches the point of use, yet we are impressed with the view expressed by those who have testified that it can be measured and the amount accurately determined by the installation of meters or other proper instruments at the place of production and especially is that true when we consider the testimony of Mr. Hale, the Chief Engineer of the plaintiff, to the effect that in the operation of the system the plaintiff determines with accuracy its metered number of kilowatt hours of energy generated by it in Idaho at its various generating stations *and before it starts in transmission on its journey to Utah and Wyoming.*" (Italics ours.)

There is no difference of opinion among the engineers and scientists as to whether the generation of electric energy can be measured at the place of production, *i. e.* on the cables leading from the generator to the bus (R. 119; 205). They all agree that it can be measured there. The statement attributed to Mr. Hale (italicized) is entirely contrary to what he said. Mr. Hale testified (R. 168) that:

> "The aggregate power generated in Idaho must be simultaneously consumed in Utah and the measurements cannot take place at the generator or any other place on the system except at the power is being simultaneously used. The energy is passing over the state line between Idaho and Utah at the time the measurement takes place."

The testimony of the scientists and engineers called as expert witnesses is all to the same effect. We have already quoted (Millikan, *supra*, p. 32; Langmuir, *supra*, pp. 32-34;

Magnusson, *supra*, p. 34). For emphasis we repeat the quotation from respondents' own witness Dr. Magnusson (*supra*, p. 34):

> "With respect to that energy which reaches the consumers, it is all in course of transit to consumers or, in fact, is being simultaneously, for practical purposes, received by them at the time of the measurement. These meters measure the energy flowing past the point at which the meter is connected. The measurement is in terms of kilowatt hours which is the unit for measuring electrical energy."

Likewise Mr. Rupp, for the respondents (*supra*, p. 34), says:

> "And these meters to which we referred, measure the energy while it is in the course of such transit, and also, in fact, while it is actually being delivered to the consumer."

In holding that electric energy generated can be measured in kilowatt hours at the generating stations and that therefore it can be measured before interstate commerce commences, the court below apparently fails to understand what it is that is being measured. It makes no difference whether meters are placed at the generating stations or anywhere else along the line. What is measured by these meters, wherever placed, is the totality of the relationship of the power consuming devices in the electric system (including the demands of the system itself) as it exists at the point of measurement with the generator, and, if the kilowatt hour unit be used, the duration of time during which such relationship exists. Electric energy on appellant's system is and must be of necessity in interstate commerce when it is measured in kilowatt hours.

The cases which the court below relied upon as upholding the Tax Act in question are *Hope Natural Gas Co.* v. *Hall*, 274 U. S. 284; *Oliver Iron Co.* v. *Lord*, 262 U. S. 172; *Heisler* v. *Thomas Colliery Co.*, 260 U. S. 245; *American Manufacturing Company* v. *City of St. Louis*, 250 U. S. 459. In the case of *Hope Natural Gas Co.* v. *Hall*, the tax was

laid upon every person engaged in the business of producing natural gas in the state, and the Supreme Court of the state had held (102 West Virginia 272) that the gross proceeds of sales of gas outside the state could not be treated as the worth of the gas within the state, but that the Act could be enforced as to the value of the gas within the state before it entered interstate commerce. This Court held that the tax, as construed by the highest court of the state, was valid because based on the value of the gas at the well before entering commerce. Similarly in *Heisler* v. *Thomas Colliery Co., supra,* the tax was upon the value of coal mined within the state before it had entered commerce. In *American Manufacturing Company* v. *City of St. Louis, supra,* it was held that an ordinance of the city of St. Louis levying a tax upon manufacturers for a license to carry on a manufacturing business in the city was valid. The tax was measured by the amount of sales of the goods manufactured locally whether sold within or without the state. The court said: "In the outcome the tax is the same in amount as if it were measured by the sale value of the goods but imposed upon the completion of their manufacture. The difference is that, for reasons of practical benefit to the taxpayer, the city has postponed payment until convenient means have been furnished through the marketing of the goods."

In the case of *Oliver Iron Company* v. *Lord, supra,* this Court held a state statute imposing an occupation tax upon the business of mining measured by a percentage of the value of the ore mined to be valid. On pages 178-9, it is said:

> "Mining is not interstate commerce, but, like manufacturing, is a local business subject to local regulation and taxation (citing authorities). Its character in this regard is intrinsic, is not affected by the intended use or disposal of the product, is not controlled by contractual engagements, and persists even though the business be conducted in close connection with interstate commerce (citing authorities). The ore does not enter interstate commerce until after the mining is done, and the tax is imposed only in respect of the mining. No discrimination against interstate commerce is involved."

The generation, transmission and use of electric energy is exactly the converse of each proposition recited in *Oliver Iron Co.* v. *Lord, supra.* The character of the business of generation of electric energy is not "intrinsic" but extrinsic. It cannot be produced on appellant's system without a call from a distant state. It is "affected by intended use or disposal of the product" and "is controlled by contractual engagements." The generation is impossible without simultaneous use, and it is in interstate commerce instantaneously with its generation. It cannot be reservoired or stored. It cannot be prepared for "interstate commerce." Its generation is inseparable with its commerce. Further, as in the other cases cited, the tax was based upon the value of the ore at the mines, and not on the unit mined and shipped. In fact, an exact antithesis exists between the case at bar and the *Oliver Iron Co.* case, *supra,* and illustrates sharply the dividing line between the class of cases to which that case belongs and the case under consideration.

In all of these cases where it has been held that a tax upon the business of manufacturing or mining was not a burden upon interstate commerce, even though the goods manufactured or mined were later transported in interstate commerce, it appeared that the process of manufacturing or mining, and the instrumentalities used therein, were distinct and separate from the process of transporting, and the instrumentalities used therein. It could not be claimed in any of these cases that the process of manufacturing or mining, or the instrumentalities used therein, had the effect of causing the transportation of the goods, or that they were a means or medium by which the commerce was carried on. In order to cause the goods to be transported, it was necessary to apply new processes and new instrumentalities which were entirely different from those which had been used in manufacturing or mining the goods.

East Ohio Gas Company v. *Tax Commission,* 283 U. S. 465, might be also cited to emphasize the distinction between the cases in which taxes of this kind have been sustained from

those in which they have been condemned. That case, unlike this case, involves the question of when interstate commerce ends, not when it begins. But the court there held that gas transported from another state loses its interstate character at the point where it is relieved from the pressure of the transmission mains, and expanded in volume in the many distribution pipes in which it rests for withdrawal by consumers. It is to be observed that gas is a commodity subject to storage, and is drawn by the consumers in the first instance immediately from the pipes, and not as in an electric system directly from the original source of supply of the energy.

South Carolina Power Company v. *South Carolina Tax Commission*, 52 Fed. (2nd) 515, and two other cases decided therewith (Nos. 542, 566 and 567), now under review with this case, involve the same error as in this case, in regarding the tax imposed as a tax upon the production of an article for transmission in interstate commerce. Instead as we have pointed out above, it is a tax upon the commerce itself, and the analogy is to the railroad, telegraph, telephone and radio cases, and not to manufacturing and production cases. The other error in the South Carolina court's decision is similarly based upon a misunderstanding of the terms used in the art with respect to the function of transformers. The South Carolina Court said (p. 524):

> "And this 'stepping-up' or 'stepping-down' is not a mere change produced in the current. It is the production of a new and different current * * *."

And at page 525

> "* * * it clearly appears that the current generated in South Carolina, upon which the tax is imposed, is not the current transmitted in interstate commerce. The current upon which the tax is imposed is the generated low-voltage current; the current transmitted in interstate commerce is the high-voltage current induced in the transformers of the company."

But electric current is not what is generated (it is merely caused to flow so as to effect the transportation of energy)

nor what the consumer uses; nor what is taxed. What is delivered to the consumer, what is used and what is taxed, is electric energy, and the flow of electric energy is continuous in the electro-magnetic path from its source to its destination. The flow of electric energy is not interrupted by transformers, but it flows directly through them without interruption or alteration (Peek, Magnusson, *supra*, pp. 28-29). It must be remembered that the tax in the case at bar is not a tax on electric current. It is a tax upon "electric energy." It is measured by kilowatt hours which can only measure electric energy, not electric current which is measured in amperes.

Thus the South Carolina court and the court below both fell into a similar error in assuming that electric current is the same as electric energy, that the process of generating such energy is separable from the process of transmitting it, and that electric energy may be measured prior to and separate from its transportation in commerce. The undisputed testimony in this case shows that these assumptions are erroneous.

In conclusion, we submit that the entire electric system is an instrumentality of commerce, unitary in its operation, and not susceptible to artificial segregation into parts for purpose of taxation. The entire system operates together to create and make possible commerce in electric energy. The kilowatt hour is the measure of such commerce. The tax on the kilowatt hour generated is a tax on energy then being transmitted in commerce measured in kilowatt hours, and upon the use of the instrumentality which causes it to move in commerce.

II.

POINT.

The Tax Act denies appellant equal protection of the laws and deprives it of property without due process in violation of the Fourteenth Amendment to the Constitution of the United States, and Section 13 of Article I of the Constitution of the State of Idaho, in that Section 5 of said Act compels the appropriation and payment of money by appellant for the benefit of private individuals, and for the same reasons violates Section 2 of Article VII and Section 2 of Article VIII of the Constitution of Idaho in that it levies a tax for other than for a public purpose, to wit: for the benefit of individuals, and violates Section 6 of Article VII of the Constitution of Idaho in that it imposes a tax for the benefit of municipal corporations, to wit: irrigation districts.

Authorities.

14th Amendment to the Constitution of the United States.
Article I, Section 13 of the Constitution of Idaho.
Article VII, Section 2 of the Constitution of Idaho.
Article VII, Section 6 of the Constitution of Idaho.
Article VIII, Section 2 of the Constitution of Idaho.
Jones v. *City of Portland,* 245 U. S. 217.
Citizens Savings, etc. Ass'n. v. *Topeka,* 20 Wall. (U. S.) 655.
Missouri Pac. R. Co. v. *Nebraska,* 164 U. S. 403.
Sharpness v. *Mayor, etc. of Philadelphia,* 21 Pa. 147.
Cole v. *City of La Grange,* 113 U. S. 1.
Ferguson v. *Ill. Cent. R. Co.,* 202 Ia. 508.

St. Louis-San Francisco Ry. Co. v. *State*, 118 Okla. 89.
Eyers Woolen Co. v. *Town of Gilsum*, 84 N. H. 1.
Bevis v. *Wright*, 31 Idaho 676.
Williams v. *Baldridge*, 48 Idaho 618.
Nicchia v. *New York*, 254 U. S. 228.
Pioneer Irrigation District v. *Walker*, 20 Idaho 605.
Guy v. *Baltimore*, 100 U. S. 434.
Darnell & Son v. *Memphis*, 208 U. S. 113.
Johnson v. *Southern P. Co.*, 196 U. S. 1.
Sullivan v. *City of Butte*, 65 Mont. 495.
Connolly v. *Union Sewer Pipe Company*, 184 U. S. 540.
Howard v. *Illinois C. R. Co.*, 207 U. S. 463.
Dorchy v. *Kansas*, 264 U. S. 286.
Lemke v. *Farmers Grain Company*, 258 U. S. 50.
Williams v. *Standard Oil Company of Louisiana*, 278 U. S. 235.

Summary.

(1) Both the Fourteenth Amendment to the Constitution of the United States and Article I, Section 13 of the Constitution of Idaho prohibit that state from depriving any person of property without due process of law. Other sections of the Constitution of Idaho prohibit taxation for private benefit, or for the benefit of political subdivisions of the state (*infra*, pp. 62-63).

(2) Section 5 of the Tax Act uses the power of taxation for the purpose of granting a subsidy to users of electric energy for irrigation pumping by requiring a credit upon their bills of an amount equal to the tax otherwise payable on such energy (*infra*, pp. 63-64).

(3) This is a use of the power of taxation for private, as distinguished from public purpose, and is void under the

Fourteenth Amendment, and other constitutional provisions cited. *Jones* v. *City of Portland, supra; Citizens Savings Ass'n.* v. *Topeka, supra,* and other cases cited (*infra,* pp. 64-70).

(4) If this section is unconstitutional for the reasons above stated, the Act must fall in its entirety. (a) The history of its passage shows that this so-called exemption, or subsidy, was inserted to secure its passage, and it would not have been passed unless it were inserted. (b) Exemption features of statutes inserted to favor certain individuals, or industries, in order to secure their passage cannot be excluded by judicial interpretation, and their invalidity carries with it the entire Act of which they are a part. *Connolly* v. *Union Sewer Pipe Co., supra; Howard* v. *Ill. C. R. Co., supra* (*infra,* pp. 70-72).

(5) This view is not affected by that section of the Act, which provides that if any section, or provision thereof, be adjudged unconstitutional, such adjudication shall not affect the validity of the Act as a whole, or any other section thereof. Such a provision merely raises a presumption in favor of the validity of the balance of the Act, and is not a command to the judiciary, if it appears that, in fact, the Act as a whole cannot be sustained and carried out without changing the legislative intent. *Dorchy* v. *Kansas, supra; Lemke* v. *Farmers Grain Co., supra; Williams* v. *Standard Oil Co., supra* (*infra,* pp. 72-74).

Argument.

Both the Fourteenth Amendment to the Constitution of the United States and Article I, Section 13 of the Constitution of Idaho prohibit that state from depriving any person of property without due process of law.

Article VII, Section 2 of the Idaho Constitution provides:

> "The Legislature shall provide such revenue as may be needful by levying a tax by valuation so that every

person or corporation shall pay a tax in proportion to the value of his, her or its property except as in this Article hereinafter otherwise provided. * * *"

Section 6 of this Article provides:

"The Legislature shall not impose taxes for the purposes of any county, city, town or other municipal corporation but may, by law, invest in the corporate authorities thereof respectively the power to assess and collect taxes for all purposes of such corporation."

Article VIII, Section 2 provides:

"The credit of the state shall not in any manner be given or loaned to or in aid of any individual, association, municipality or corporation nor shall the state directly or indirectly become a stockholder in any association or corporation."

While these constitutional provisions have distinct objects, the underlying principles involved in so far as they affect powers of taxation, and the facts which give rise to their application in this case, are the same.

As applied to the problem here presented, these provisions of both federal and state constitutions prohibit the use of the power of taxation for private as distinguished from public purposes, and the provisions quoted from Articles VII and VIII of the Idaho Constitution prohibit the use of the state's taxing power for the benefit of either private persons or corporations or of political subdivisions of the state. If a part of the tax levied by the Tax Act accrues not to the public treasury but to private benefit, the Act offends both the Fourteenth Amendment to the federal Constitution and the corresponding provisions of the state Constitution. If a further portion of the tax accrues to the benefit of municipal corporations, viz., public irrigation districts, the Act further offends the other provisions of the Idaho Constitution above quoted.

These questions are raised by Section 5 of the Tax Act.

We quote the Section in full:

> "SEC. 5. All electricity and electrical energy used for pumping water for irrigation purposes to be used on lands in the State of Idaho is exempt from the provisions of this Act, except in cases where the water so pumped is sold or rented to such irrigated lands. Provided, the exemption here given shall accrue to the benefit of the consumer of such electricity or electrical energy. Provided further that the full amount of such license tax which would have been due from such producers of electricity and electrical energy, if such exemptions had not been made, shall be credited annually for the year in which the exemptions are made on the power bill to the consumer by the producer of such electricity and electrical energy, furnishing such power, and such producer shall include a statement of the amount of electricity and electrical energy exempted by this section, furnished by it for the purpose of pumping water for irrigation purposes on lands in the State of Idaho, to the commissioner of Law Enforcement of the State of Idaho as a part of the statement required by Section 1 of this Act, together with a statement of the credits made on the power bills to the consumers of such electricity and electrical energy for the pumping of water for irrigation to be used on lands in the State of Idaho."

The practical application of this provision to appellant is described by Hale (R. 167) and Gadsby (R. 181). For the last year for which figures were available 6,838,000 kilowatt hours were measured as delivered to irrigation consumers. The energy measured at the generator required to supply this use would be in excess of this by an indeterminate amount up to 20%. If the so-called exemption is to be applied to the delivered energy the tax would be approximately $3,400 per year. Appellant in paying the license tax monthly would in effect deduct from the tax otherwise payable the portion of this amount accruing during the preceding month. At the end of the season appellant would credit, pro rata according to use, to its irrigation customers on their bills for energy for the season, the amount so deducted from the monthly tax bills.

The purpose and effect of this provision is to take the producer's money and give it to favored consumers, the irrigation pumping farmers. It is clear that the credit is for private and not for public benefit. The so-called exemption is not such, but is a forced donation by one taxpayer to another. It is fundamental that the power of taxation cannot be used for the raising of money other than for public purposes; and it is equally true that private property cannot be taken for private purposes.

Jones v. *City of Portland*, 245 U. S. 217.

In *Citizens Savings Etc. Ass'n.* v. *Topeka*, 20 Wall. (U. S.) 655, this Court said (p. 664):

> "To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms.
>
> Nor is it taxation. 'A tax,' says Webster's Dictionary, 'is a rate or sum of money assessed on the person or property of a citizen by government for the use of the nation or state.' 'Taxes are burdens or charges imposed by the legislature upon persons or property to raise money for public purposes.' Cooley, Const. Lim., 479."

Similarly in *Missouri Pac. R. Co.* v. *Nebraska*, 164 U. S. 403 (p. 417):

> "The taking by a State of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the Fourteenth Article of Amendment of the Constitution of the United States."

In *Sharpness* v. *Mayor, etc., of Philadelphia*, 21 Pa. 147, the Supreme Court of Pennsylvania said (p. 168):

> "Neither has the legislature any constitutional right to create a public debt, or to lay a tax, or to authorize any municipal corporation to do it, in order to raise funds for a mere *private* purpose. No such authority passed to the Assembly by the general grant of legislative power. This

would not be legislation. Taxation is a mode of raising revenue for *public* purposes. When it is prostituted to objects in no way connected with the public interests or welfare, it ceases to be taxation, and becomes plunder. Transferring money from the owners of it, into the possession of those who have no title to it, though it be done under the name and form of a tax, is unconstitutional for all the reasons which forbid the legislature to usurp any other power not granted to them."

In *Cole* v. *City of La Grange,* 113 U. S. 1, this Court said (pp. 7-8):

> "The express provisions of the Constitution of Missouri tend to the same conclusion. It begins with a Declaration of Rights, the sixteenth article of which declares that 'no private property ought to be taken or applied to public use without just compensation.' This clearly pre-supposes that private property cannot be taken for private use. * * * Otherwise, as it makes no provision for compensation except when the use is public, it would permit private property to be taken or appropriated for private use without any compensation whatever. It is true that this article regards the right of eminent domain, and not the power to tax; for the taking of property by taxation requires no other compensation than the taxpayer receives in being protected by the government to the support of which he contributes. But, so far as respects the use, the taking of private property by taxation is subject to the same limit as the taking by the right of eminent domain. Each is a taking by the State for the public use, and not to promote private ends.

See also

Ferguson v. *Ill. Cent. R. Co.,* 202 Ia. 508;
St. Louis-San Francisco Ry. Co. v. *State,* 118 Okla. 89;
Eyers Woolen Co. v. *Town of Gilsum,* 84 N. H. 1.

The Supreme Court of Idaho in *Bevis* v. *Wright,* 31 Idaho 676, recognizes this principle. Quoting authorities to the effect that taxes may only be levied for public purposes and that a tax imposed for an object in its nature essentially private is void, the court sustained the tax involved (for ex-

hibition of products at domestic and foreign exhibitions for the purpose of encouraging immigration) as having been levied for a public purpose.

Thus, the Supreme Court of Idaho has very clearly laid down the rule that tax moneys may not be appropriated for private purposes. If Section 5 of the Tax Act is to be sustained, it is equivalent to holding that the legislature may do indirectly that which it may not do directly. If the State may not devote its own money to private purposes, what valid reason is there for holding that the State may decree the use of private money for private purposes? Since the money to be credited under Section 5 is not tax money, because of the exemption feature of Section 5, it must remain private money. The question, therefore, is whether or not the State may take private money for private purposes without compensation. We have failed to find any authority which justifies such confiscatory legislation.

The principle involved in the credit provisions of Section 5 is of paramount importance. Its possibilities, if approved by this Court, are startling. It affords a method "to lay with one hand the power of the government on the property of the citizen and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes"—a thing, which this Court has held, cannot be constitutionally done.

Citizens Savings Etc. Ass'n. v. *Topeka, supra.*

We are not unaware that the Supreme Court of Idaho has passed upon the question of exempting physical property used for irrigation pumping purposes from a general property tax in the case of *Williams* v. *Baldridge,* 48 Idaho 618. However, the point that we are relying upon here was specifically reserved from decision there, since the plaintiffs in that case (who were not the companies concerned) had no standing to raise them, and, on this point, the court said (p. 631):

> "Appellants' fourth and last point is that taking the funds resulting from the exemption from the Idaho Power Company, and giving it to the irrigationists is

depriving the power company of its property without just compensation in violation of Section 13 of Article I of the Idaho Constitution and the Fourteenth Amendment of the Constitution of the United States.

"As indicated in the discussion with reference to appellants' first point, they do not show that they are in a position to urge this contention; hence it becomes unnecessary to pass upon the same."

The statutory court completely overlooked this reservation of decision by the Idaho Supreme Court, and (R. 26) cites *Florida Central, etc. R. Co.* v. *Reynolds,* 183 U. S. 471; *Bell's Gap R. Co.* v. *Pennsylvania,* 134 U. S. 232 in support of its holding on the so-called exemption feature of the Act. These cases, however, have nothing whatever to do with a credit provision similar to Section 5. Nor is such provision to be confused with a police measure containing a license tax as a part thereof, such as was considered in *Nicchia* v. *New York,* 254 U. S. 228. This case only serves to emphasize the illegality of such a credit provision. The court below also considered this question as one entirely of state law. Assuming *Williams* v. *Baldridge, supra,* to be controlling, it said (R. 26): "the federal court will not interfere in the matter of exemption from state taxation under the Fourteenth Amendment as such matters of classification are of state policy to be determined by the state." But our contention is not one of classification and exemption under state law, but of a fundamental violation of the due process clause of the Federal Constitution, through unlawful taking of property for private use, and decision of that contention is expressly reserved by the Supreme Court of Idaho in the case cited.

With respect to the inhibition of Article VII, Section 6 of the Idaho Constitution, an irrigation district organized under the state law as a quasi-public corporation with its own power of assessment and taxation for the purpose of irrigating lands within the district, has been held to be a municipal corporation for which the state may not levy taxes. *Pioneer Irrigation District* v. *Walker,* 20 Idaho 605.

That the appellant furnishes electric energy for such districts which are entitled to the benefits of this so-called exemption and actual subsidy, if the same is valid, is alleged in the Bill of Complaint (Paragraph 15) (R. 12) and is not denied by the Answer, which merely denies that the Act is invalid for the reason assigned (Paragraph 15) (R. 53).

However, there is no reason to discuss further this particular section of the Idaho Constitution, or its application to the Act under consideration. If the section grants a private subsidy at appellant's expense, as we contend, and is not a true exemption, it is void under the due process clauses of the federal and state constitutions, and as a tax for private instead of public purposes, and further grounds of invalidity are unimportant.

But this provision of the Act presents further difficulties not only under the due process clause, but under the commerce clause of the Constitution. The exemption, if it be otherwise valid, extends to electric energy used to pump water for lands in Idaho. No similar exemption is given for electric energy similarly used in Utah, hence, if it be otherwise valid, it results in a denial of due process and equal protection, and also a direct discrimination against interstate commerce, in that the same energy generated and transmitted for irrigation pumping is taxable or exempt according as its destination is Idaho or Utah. This problem is actually presented in appellant's system.

Mr. Gadsby, the appellant's president, says:

> "One company connected with our lines and pumping water in Idaho, irrigates land in both Idaho and Utah. Our company has no knowledge, or means of obtaining knowledge, of the amount of land so irrigated in either state, and could not determine the proportionate power used at its pumping plant for irrigating land in Idaho." (R. 180, 181).

The chief engineer, Mr. Hale, testifies to the same effect (R. 167, 168).

This energy has been generated and transmitted to a pumping station located in Idaho for border lands in the two states,

and is "exempted", or not, according as the land actually irrigated is in one state or the other.

It is well settled that a discrimination against interstate commerce makes a tax act invalid.

Guy v. *Baltimore*, 100 U. S. 434;
Darnell & Son v. *Memphis*, 208 U. S. 113.

If Section 5 is unconstitutional for the reasons hereinbefore stated, the Act must fall in its entirety.

As shown by the affidavit of Secretary of State Lukens, included by stipulation in the testimony (R. 99, 104), the regular session of the Idaho State Legislature had before it House Bill No. 44, introduced on January 29, 1931. This bill, as amended during its progress, became substantially identical with the Tax Act as passed at the Extraordinary Session, except that it did not contain this controverted Section 5. It was before the House until March 5, 1931, when it was withdrawn (R. 101). The Tax Act in its present form, with Section 5 included, was introduced at the Extraordinary Session and passed (R. 103, 104).

We may fairly assume from this legislative history that the Act would not have been passed had the exemption and credit provisions of Section 5 not been included. We may properly refer to this history, since legislative journals may be examined to assist in determining the importance of Section 5 in the legislative scheme.

Johnson v. *Southern P. Co.*, 196 U. S. 1.
Sullivan v. *City of Butte*, 65 Mont. 495.

But irrespective of the argument based on this legislative record, Section 5 may not be removed from this Act in whole or in part without doing violence to the whole legislative intent. It is quite apparent that the exemption and credit provisions were essential to the legislative scheme, and that irrigation pumping service was not to be burdened with the tax. If the exemption is maintained and only the credit eliminated, the appellant secures an exemption which the Legislature did not intend to grant. If both are elimi-

nated irrigation service is subjected to a burden from which it was expressly intended to be exempt. The court cannot say what the legislative intent was, if the credit be eliminated, and any judicial construction becomes judicial legislation.

The rule which we invoke in this case is that the unconstitutionality of Section 5 carries with it a condemnation of the entire Act, for the reasons expressed in *Connolly* v. *Union Sewer Pipe Company*, 184 U. S. 540, passing on an Illinois statute declaring certain business combinations illegal, but exempting agriculturists and live stock dealers.

The court said (pp. 564-5):

> "We therefore hold that the Act of 1893 is repugnant to the Constitution of the United States, unless its ninth section can be eliminated, leaving the rest of the act in operation.
>
> "The principles applicable to such a question are well settled by the adjudications of this court. If different sections of a statute are independent of each other, that which is unconstitutional may be disregarded, and valid sections may stand and be enforced. But if an obnoxious section is of such import that the other sections without it would cause results not contemplated or desired by the legislature, then the entire statute must be held inoperative. The first section of the act here in question embraces by its terms *all* persons, firms, corporations or associations of persons who combine their capital, skill or acts for any of the purposes specified, while the ninth section declares that the statute shall not apply to agriculturalists or livestock dealers in respect of their products or stock in hand. If the latter section be eliminated as unconstitutional, then the act, if it stands, will apply to agriculturalists and livestock dealers. Those classes would in that way be reached and fined, when, evidently, the legislature intended that they shoud not be regarded as offending against the law even if they did combine their capital, skill or acts in respect of their products or stock in hand. Looking then at all the sections together, we must hold that the legislature would not have entered upon or continued the policy indicated by the statute unless agriculturalists and livestock dealers were excluded from its opera-

tion and thereby protected from prosecution. The result is that the statute must be regarded as an entirety, and in that view it must be adjudged to be unconstitutional as denying the equal protection of the laws to those within its jurisdiction who are not embraced by the ninth section."

Later in *Howard* v. *Illinois C. R. Co.*, 207 U. S. 463, an Act of Congress relating to liability of common carriers was considered. The act made every common carrier liable to its employees for damage resulting from negligence. This act was held to include damages resulting from intrastate or local operations, as well as from interstate transactions. The court held that the statute embraced subjects within the authority of Congress to regulate and also subjects without its constitutional power, and these were so interblended in the statute as to be incapable of separation, the court saying (p. 501):

"Of course, if it can be lawfully done, our duty is to construe the statute so as to render it constitutional. But this does not imply, if the text of an act is unambiguous, that it may be rewritten to accomplish that purpose. Equally clear is it, generally speaking, that where a statute contains provisions which are constitutional and others which are not, effect may be given to the legal provisions by separating them from the illegal. But this applies only to a case where the provisions are separable and not dependent one upon the other, and does not support the contention that that which is indivisible may be divided. Moreover, even in a case where legal provisions may be severed from those which are illegal, in order to save the rule applies only where it is plain that Congress would have enacted the legislation with the unconstitutional provisions eliminated. All these principles are so clearly settled as not to be open to controversy."

Our position does not ignore the language of Section 11 of the Act, which provides that an adjudication that any section or provision of the Act is unconstitutional or invalid for any reason shall not affect the validity of the Act as

a whole, or of any act, section, or provision not specifically adjudged unconstitutional or invalid. Such provisions are common and their effect has been considered in *Dorchy* v. *Kansas*, 264 U. S. 286. Here the constitutionality of the Kansas Court of Industrial Relations was considered. One section was held unconstitutional, and then the determination of its effect on the whole act was considered in the light of a section similar to Section 11 of this Act. The court said (p. 290):

> "Whether § 19 is so interwoven with the system held invalid that the section cannot stand alone, is a question of interpretation and of legislative intent * * *. Section 28 of the act * * * provides a rule of construction which may sometimes aid in determining that intent. But it is an aid merely; not an inexorable command".

It is said in *Lemke* v. *Farmers Grain Company*, 258 U. S. 50, when the point was raised that an unconstitutional provision caused the North Dakota Grain Act to fall (p. 60):

> "It is apparent that without these sections the state legislature would not have passed the act. Without their enforcement the plan and scope of the act fails of accomplishing its manifest purpose. *We have no authority to eliminate an essential feature of the law for the purpose of saving the constitutionality of parts of it.*" (Italics ours.)

In *Williams* v. *Standard Oil Company*, 278 U. S. 235, the Louisiana law permitting the state to fix the price of gasoline was held unconstitutional. There were provisions in the act other than those for price-fixing, and Section 12 of the act contained a clause similar to Section 11 of this Act. The court held that this raised a presumption of divisibility and said (p. 242):

> "The effect of the statutory declaration is to create in the place of the presumption just stated the opposite one of separability. That is to say, we begin, in the light of the declaration, with the presumption that the legislature intended the act to be divisible; and this pre-

sumption must be overcome by considerations which make evident the inseparability of its provisions or the clear probability that the invalid part being eliminated the legislature would not have been satisfied with what remains.

"In the present case, it requires no extended argument to overcome the presumption and to demonstrate the indivisible character of the act under consideration."

* * * * * *

And at page 245:

"Accordingly, we must hold that the object of the statute under review was to accomplish the single general purpose which we have stated, and, that purpose failing for want of constitutional power to effect it, the remaining portions of the act, serving merely to facilitate or contribute to the consummation of the purpose, must likewise fall."

III.

POINT.

The Tax Act violates Section 16 of Article III of the Constitution of Idaho which provides that every Act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title.

Authorities.

Section 16, Article III, Constitution of Idaho.
Posados v. *Warner, B. & Co.*, 279 U. S. 340.
State v. *Banks*, 37 Idaho 27.
Hailey v. *Huston*, 25 Idaho 165.
Pioneer Irrigation District v. *Bradley*, 8 Idaho 310.
Cooley's Constitutional Limitations, Eighth Edition, Vol. I, page 310.
In re Breene, 14 Colo. 401.
Utah Mortgage Loan Corp. v. *Gillis*, 49 Idaho 676.
Jackson v. *Gallet*, 39 Idaho 382.
Turner v. *Coffin*, 9 Idaho 338.
Katz v. *Herrick*, 12 Idaho 1.

Summary.

(1) The title and Act contain two subjects—

(a) the levy of a license tax on electric energy generated in the state; and (b) a subsidy in favor of irrigation pumping users, and is, therefore, void under Idaho Constitution. Article III, Section 16. *State* v. *Banks, supra; Hailey* v. *Huston, supra* (*infra*, pp. 76-79).

(2) The subject of the Act is not expressed in the title, in that,—(a) the title purports to levy a license tax on electric energy generated for barter, sale or exchange, and the

text of the Act purports to levy a tax on the producer of electric energy for barter, sale or exchange, measured by all electric energy generated, manufactured or produced by him; (b) there is a variance between that part of the title which relates to Section 5 of the Act exempting from the tax electric energy used for pumping water, and the text of Section 5 which does not provide an exemption, but a subsidy to irrigation pumping consumers. The Act is void for these variations between subject and title. *Utah Mortgage Loan Corp.* v. *Gillis, supra; Jackson* v. *Gallet, supra,* and other cases cited (*infra,* pp. 79-82).

Argument.

(1) *The title and Act contain two distinct subjects.*

Section 16 of Article III of the Constitution of Idaho provides:

> "Every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title; but if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be embraced in the title."

The Tax Act under consideration contains two subjects, expressed both in title and text.

Quoting so much of the title as is necessary to state the point, it is

> "An act levying a license tax of one-half mill per kilowatt hour on electricity and electrical energy generated, manufactured or produced in the State of Idaho for barter, sale or exchange * * * exempting from such license tax the electricity and electrical energy actually used for pumping water for irrigation purposes on lands in the State of Idaho and providing that such exemptions shall accrue to the benefit of the consumer of such electricity and electrical energy * * *".

All of the Act, except Section 5 thereof, which relates to the so-called exemption, and all of the title, except the clause relating to such exemption as above quoted, are germane to the levy of a license tax, and the provision of means for its enforcement.

But, as argued under the preceding point, Section 5 of the Act does not grant an exemption of certain electric energy from the tax, but provides a credit upon the power bills of consumers. Whether this provision be valid or not, both the title and the Act provide for two distinct subjects—(a) the levy of a license tax for revenue purposes, and (b) a definite reduction of existing charges for irrigation pumping by an amount equal to the tax that would otherwise be payable under the Act. If this be a valid exercise of legislative power, one part of the title and Act relates to the raising of revenue, and the other part of title and Act to the appropriation of private money, or, perhaps, to the reduction of rates for a certain class of utility service.

We recognize the rule stated by this court in *Posados* v. *Warner, B. & Co.*, 279 U. S. 340, wherein it is said (p. 344):

> "The purpose is to prevent the inclusion of incongruous and unrelated matters in the same measure and to guard against inadvertence, stealth and fraud in legislation. * * * in order to warrant the setting aside of enactments for failure to comply with the rule, the violation must be substantial and plain."

But this is a "substantial and plain" violation of the constitutional provision. In such cases the Supreme Court of Idaho has subjected legislation of that state to strict construction.

> "An examination of the title and the act discloses that the subject is embraced in both and therefore in compliance with sec. 16, art. 3, but the act is still repugnant to that section, for the reason that it embraces more than one subject and matters properly connected therewith. The negotiation and sale of general fund treasury notes and the negotiation and sale of refunding bonds are two separate and distinct subjects. The former has nothing

to do with the indebtedness of the state (*State* v. *Eagleson* 32 Ida. 276, 181 Pac. 934; *State* v. *Eagleson,* 32 Ida. 280, 181 Pac. 935), while the latter has. The former is in no sense properly connected with the latter. The acts are individualized. Each is independent of the other and neither can be, by fair intendment, considered as falling within the same subject matter legislated upon or necessary as ends and means to the attainment of each other. Neither is directly or indirectly related to the same subject" (p. 31).

State v. *Banks,* 37 Idaho 27.

"And if it were included in the title to said act, the act would be obnoxious to the constitution under another provision of Sec. 16, which declares that every act shall embrace but one subject and matters properly connected therewith. A general appropriation act includes one subject and an increase in the salary of an officer is another and distinct subject, and being two separate and distinct subjects, they are prohibited from being combined in one act by the provisions of said section.

* * * * * *

"That section of the constitution which provides that every act shall embrace but one subject and matters properly connected therewith, and that such subject shall be expressed in the title, was for the purpose of giving the members of the legislature as well as citizens generally notice of the purpose and object of the bill, and provides for titles to all bills as well as for a unity of title and subject matter. Said appropriation in the general appropriation bill would not and could not amend the statute fixing the salary of the officer referred to."

Hailey v. *Huston,* 25 Idaho 165, 168, 169.

The reasons for this constitutional provision are well known and have been frequently stated. It is intended to prevent trading or "log rolling" in legislation by tacking on to bills mainly for one purpose, provisions for other and unrelated purposes in order to secure votes for their passage. *Pioneer Irrigation District* v. *Bradley,* 8 Idaho 310. The record of the passage of the Tax Act, as previously referred to, we think supports the conclusion that Section 5 was in-

serted in the Bill in order that it might secure support which was otherwise lacking. It is within the text, as well as the reason, of the constitutional provision.

(2) *The subject of the Act is not expressed in the title.*

(a) The title of the Act, as previously quoted, purports to levy "a license tax of one-half mill per kilowatt hour on electricity and electrical energy generated, manufactured or produced in the State of Idaho for barter, sale or exchange." Section 1 of the Act requires every corporation, etc., engaged "in the generation, manufacture or production of electricity and electrical energy in the State of Idaho, either through water power or by any other means, for barter, sale or exchange" to render a statement "of all electricity and electrical energy generated, manufactured or produced by him or it in the State of Idaho during the preceding calendar month and therewith pay a license tax of one-half mill per kilowatt hour on all such electricity and electrical energy so generated, manufactured or produced, measured at the place of production."

The question arises over the meaning of the words—"so generated, manufactured or produced". Grammatically, they seem to refer to the immediately preceding similar words "all electricity and electrical energy generated, manufactured or produced * * * in the State of Idaho".

The court below has construed them to relate to the clause first above quoted—"in the generation, manufacture or production of electricity * * * for barter, sale or exchange", as in the title. If this construction is correct, then it is only on electricity or electric energy "generated, manufactured or produced in the State of Idaho for barter, sale or exchange", as described in the title, that the tax is levied. But if, on the contrary, the tax is levied on the producer for barter, sale or exchange on "all electricity and electrical energy generated, manufactured or produced by him or it in the State of Idaho", then the Act taxes a materially larger quantity of electric energy than that described in the title,

and to that extent differs from the title so materially as to bring the Act under the condemnation of that clause of Section 16 of Article III of the Idaho Constitution, above quoted, which requires that the "subject shall be expressed in the title".

The reason for this is that electric energy is generated by a commercial producer to supply not only the requirements of his consumers, but also the necessary uses at the generating station for pumps, motors, lights, etc., and to energize the system and transmit energy to the consumer. While different systems vary, a well constructed and operated system, such as that of appellant, will consume by way of station uses and system uses, or so-called losses, up to approximately 20% of the energy generated (R. 167). The nature of these losses and their relation to the electrical processes have been herein previously discussed (see *ante*, pp. 30-31).

Unless, therefore, the text of the Act is to be limited by the title, as the court below decided, the title purports to levy a tax of .5 mill per kilowatt hour on the effective delivered energy of the commercial system—that is, that which is sold to customers, and the text of the Act, in effect, levies a tax of approximately .625 mill per kilowatt hour on such effective energy, estimating losses at twenty percent.

The court below realized this discrepancy but sustained the Act against this objection on the express ground that the text of the Act was to be read in the same way as the title (Opinion on interlocutory injunction, R. 32). We will endeavor to show under Point IV that this construction renders the Act so ambiguous as to make it unenforcible and void for uncertainty.

But this construction was forced upon the court to sustain the Act, and if it erred therein then the Act must fall under the constitutional provision above quoted. It seems too clear to require argument that a tax on energy generated "for barter, sale or exchange" is an entirely different thing than a tax on "all energy generated, manufactured

or produced" in the state. Or, expressed otherwise, that a tax of .625 mill is not indicated by a title which proposes to levy a tax of .5 mill per kilowatt hour.

The legislature may very well have declared in the title of the Act that it was its intention to levy a tax on all kilowatt hours generated in the State of Idaho, but it did not do so. It restricted the basis of the tax to those kilowatt hours generated for barter, sale or exchange.

In Cooley's Constitutional Limitations, Eighth Edition, Vol. I, page 310, the distinction which we make is stated as follows:

> "As the legislature may make the title to an act as restrictive as they please, it is obvious that they may sometimes so frame it as to preclude many matters being included in the act which might with entire propriety have been embraced in one enactment with matters indicated by the title, but which must now be excluded because the title has been made unnecessarily restrictive. The courts cannot enlarge the scope of the title; they are vested with no dispensing power; the constitution has made the title the conclusive index to the legislative intent as to what shall have operation; it is no answer to say that the title might have been made more comprehensive, if in fact the legislature have not seen fit to make it so."

It is likewise well expressed in a Colorado case, *In re Breene,* 14 Colo. 401. It is said (pp. 405-406):

> "The general assembly may, within reason, make the title of a bill as comprehensive as it chooses, * * * the legislature may, on the other hand, undoubtedly contract the scope of a title to the narrowest limits. When, however, in the exercise of this discretion, it sees fit to thus restrict the title, care must be taken not to transcend, in the body of the bill, the limit thus voluntarily fixed. * * * The matter covered by legislation is to be 'clearly,' not dubiously or obscurely indicated by the title. Its relation to the subject must not rest upon a merely possible or doubtful inference. The connection must be so obvious that ingenious reasoning aided by superior rhetoric will not be necessary to re-

veal it. Such connection should be within the comprehension of the ordinary intellect as well as the trained legal mind. * * *"

Reading the title in question in connection with the body of the Act, we may say, without fear of successful contradiction, that nothing could be more foreign to the reader's mind than that the body of the Act contemplated a tax on all electric energy generated as distinguished from that generated for barter, sale or exchange.

This provision of the Constitution has been frequently construed and enforced by the Idaho courts. Thus, a tax on corporate property, or business, cannot be sustained when the title indicates that it is on "shares of stock". *Utah Mortgage Loan Corp.* v. *Gillis,* 49 Idaho 676.

A title which is delusive or false violates the Constitution. *Jackson* v. *Gallet,* 39 Idaho 382.

See also

Turner v. *Coffin,* 9 Idaho 338;
Katz v. *Herrick,* 12 Idaho 1;
Hailey v. *Huston,* 25 Idaho 165.

(b) There is a similar variance between that part of the title which relates to Section 5 of the Act "exempting from such license tax the electricity and electrical energy actually used for pumping water for irrigation purposes on lands in the State of Idaho, and providing that such exemptions shall accrue to the benefit of the consumer of such electricity and electrical energy", and the text of Section 5, which, as hereinbefore quoted and discussed, does not provide an exemption at all, but provides a subsidy to the irrigation pumping consumers. One would naturally think, upon reading the title, that such electricity or electric energy was exempt from the tax, and that some way, as, for example, by declaring that the amount of such tax should not be included in irrigation pumping rates, the exemption was to benefit the consumer, but no one would imagine from the title that the Act proposed any such subsidy under the guise of taxation as is proposed by Section 5.

IV.

POINT.

The Tax Act is void and unenforcible for the various uncertainties and ambiguities alleged in the Bill of Complaint, so that the enforcement thereof would constitute arbitrary administrative action, without legislative guide, and thus take appellant's property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

Authorities.

United States Constitution, Fourteenth Amendment.
Connally v. *General Construction Company,* 269 U. S. 385.
United States v. *Capital Traction Company,* 34 App. D. C. 592.
Western Union Tel. Co. v. *Texas,* 62 Tex. 630.
Standard Oil Co. v. *State,* 178 Ala. 400.
International Harvester Company v. *Kentucky,* 234 U. S. 216.
United States v. *Shreveport Grain & Elevator Co.,* 46 Fed. (2nd) 354.

Summary.

(1) The Act is void for uncertainty and ambiguity because it cannot be determined whether a tax is levied on all kilowatt hours generated or produced, or only on such as are generated or produced for barter, sale or exchange. If the latter is the true construction, and the court below so construed the Act in order to sustain it against the objection that the title did not express the subject, then the Act affords no guide or means for the determination of what electric

energy is generated for barter, sale or exchange, and does not confer upon the Commissioner of Law Enforcement any power to prescribe a formula for such determination, but attempts, on its face, to fix a place and method of measurement, which, of necessity, excludes any possibility of determining the energy generated for barter, sale or exchange (*infra*, pp. 84-88; 89-90).

(2) A similar ambiguity and uncertainty is involved in Section 5. This section provides for the so-called exemption and credit on irrigation power bills of the full tax which would have been due on such energy. Since the only measurement of the tax is at the point of generation, and the only means of determining the irrigation pumping use is at the users' pumps, there is no possible means of determining the amount of energy generated for irrigation pumping (*infra*, pp. 88-90).

(3) The Act, being highly penal in its nature, must be capable of definite construction and enforcement according to its terms, and failing in this, violates the due process clause of the Constitution. *Connally* v. *General Construction Co.*, *supra*; *United States* v. *Capital Traction Co.*, *supra*; *International Harvester Co.* v. *Kentucky*, *supra*; *U. S.* v. *Shreveport Grain & El. Co.*, *supra*; *Western Union Tel. Co.* v. *Texas*, *supra* (*infra*, pp. 90-93).

Argument.

Two principal uncertainties and ambiguities in the Tax Act are alleged in paragraph 16 of the Bill of Complaint (R. 13, 14). They are stated in the Summary under this Point.

(1) In the argument under the preceding point, we discussed the difficulty in construction of Section 1, the basic section of the Act. By only one construction can the Act be held to be definite and certain; that is, that the tax is on all kilowatt hours generated whether for barter, sale or exchange or for the producer's own use. But this construc-

tion renders the Act vulnerable under Section 16 of Article III of the Idaho Constitution as previously discussed.

It was, therefore, contended by the State and was held by the court below on the motion for interlocutory injunction, that the tax is only on kilowatt hours generated for barter, sale or exchange.

The court in its memorandum opinion said the text of the Act "refers to energy generated for 'barter, sale or exchange' the same as referred to in the title" (R. 30), and that both title and Act "provide for a license tax of one-half mill per kilowatt hour on electricity generated, manufactured or produced for barter, sale or exchange" (R. 32). The defendant's amended answer accepts this interpretation of the Act and denies (paragraph 5) that the defendant Commissioner has construed or will "construe said Tax Act to impose a tax on all electrical energy generated or produced within the State of Idaho or upon any such energy other than that produced within said State for barter, sale or exchange" (R. 40), and further denies (paragraph 6) that "said Commissioner intends to compute or ascertain or assess against plaintiff any taxes upon any electrical energy except that produced and generated by plaintiff in the State of Idaho for barter, sale or exchange" (R. 41).

This, then, being the formal construction of the Act both by the court and the chief law officers of the State, we find that the form of license tax statement prescribed by the Commissioner for administration of the Act, provides for a statement of the total number of the kilowatt hours generated, and for deduction therefrom of those furnished for pumping water for irrigation on lands in Idaho, and the kilowatt hours "actually transformed into power or light by producer for use personal to it and not bartered, sold or exchanged, exclusive of losses in transmission". The tax due is computed on the net kilowatt hours generated after these deductions. Provision is then made for a statement of the credits on power bills of irrigation users as provided in Section 5. (For form of statement see R. 105-109).

Certainly there is nothing in the Tax Act which justifies this construction. While an erroneous construction by the Commissioner is not grounds to enjoin the enforcement, yet such construction definitely evidences the fatal ambiguities of the Act as construed by the court below and the respondent Attorney General.

If the Act only taxes electric energy generated for barter, sale or exchange, there is no justification for the assessment of a tax on kilowatt hours generated in response to system demands and uses, or so-called system losses. Energy generated to magnetize the transformers (iron losses), and to overcome the resistance in the conductors (copper losses), used in the conveyance of energy to the consumers, is no more generated for barter, sale or exchange than is energy used to light the power stations and operate station pumps and other control apparatus.

If, therefore, we assume the Commissioner is wrong in not providing for deduction of these system uses or losses as well as the station uses, the statute leaves us without means for determining what these uses or losses are. The only basis of measurement prescribed by the Act is meter readings "at the place of production", and the Act assumes that one may there definitely measure energy generated for barter, sale or exchange. But this is impossible. Energy so generated can only be determined from the readings of the consumers' meters showing the deliveries to consumers (Hale, R. 161, 162). Now we agree that the Act could validly provide, in levying a tax on energy generated for barter, sale or exchange (if we disregard the interstate commerce question), either for a report of the total energy so bartered, sold or exchanged, or for a determination of a method of calculation of system uses or losses by the Commissioner, but it has not done so.

On the appellant's system the problem is mathematically insolvable with respect to energy transmitted to Utah for barter, sale or exchange. The energy delivered to that part

of the system located in Utah there becomes commingled with energy originating in Utah (Hale, R. 169):

> "It is not possible from any meter which the company has, or which it could install at the generating stations or so-called place of production, to record or determine the actual number of such kilowatt hours generated for barter, sale or exchange."

The Act not only gives no basis for even an approximate computation of this quantity, but if it be rewritten so as to provide for such a determination by meter readings in Utah, it would seem that not only would the State be going beyond its territorial jurisdiction in obtaining the data necessary for the enforcement of its tax, but the tax by its very terms would be one upon energy bartered, sold or exchanged in Utah.

In brief, construing the Act as the court has construed it, as a tax on energy generated for barter, sale or exchange, no provision has been made, and by the terms of the Act in basing the tax solely on measurements at the place of production, administrative provision is excluded, for a determination of the amount on which the tax is to be paid.

The legislature is explicit in prescribing the method of measurement of the tax. The method prescribed by the Act is inflexible and the Commissioner of Law Enforcement is not empowered to depart therefrom. Section 1 of the Act provides that the tax shall be

> "measured at the place of production and as shown on such statement in the manner and within the time hereinafter provided."

Section 4 of the Act, among other things, provides

> "for the purpose of measuring such electricity and electrical energy such producer shall keep and maintain at the point or points of production a recording watt hour meter or meters, or other suitable instrument for measuring the electricity or electrical energy produced."

When the Commissioner attempts to construe the Act in accordance with the court's decision, his construction must necessarily be arbitrary, as it is in the form which he has prescribed, viz., arbitrarily providing for the subtraction of energy used by the appellant company for one purpose, and equally arbitrarily refusing to subtract energy used by the company for another but equally indispensable purpose. If he were to make provision for some form of computing system uses or losses his formula would be equally arbitrary, and extrinsic either to the text of the Act or any authority conferred upon him by it. Nor is this uncertainty by any means a trifling detail. It is shown by the evidence that the so-called station uses for pumps, motors, lights, etc., for the Idaho stations amount to approximately 7,000,000 kilowatt hours per year (R. 160), and that the transformer and line uses or losses will run to as high as twenty per cent. of the total generated energy (R. 167). Thus this uncertainty or ambiguity in the Act involves a tax liability of upwards of $20,000 per year on the appellant's system alone.

(2) A similar ambiguity and uncertainty is involved in Section 5. This section provides for the so-called exemption or credit on power bills of the "full amount of such license tax which would have been due from such producers of electricity or electrical energy". Since the only place of measurement and of calculation of the tax provided by the Act is at the generator, and the only point of determining the irrigation pumping use is at the user's pumps, there is no possible means of determining the amount of energy generated for irrigation pumping, including that required to transmit such energy to the user. The irrigation users are on all kinds of transmission and distribution lines. The losses are in fact individual to each case varying according to distance, size of conductors, kind of line and other variables (R. 167). Now, while the Act might prescribe a general formula for a conventional determination of these losses, it does not do so, but it assumes that a meter "at the place of production", taken into

consideration with billings to the consumers will in some way measure energy generated for irrigation uses. This it obviously cannot do.

These uncertainties and ambiguities in the Act were called to the attention of the court below on the final hearing after the decision on a motion for interlocutory injunction (R. 161, 162, 167), in which it had decided that the Act was to be construed as levying a tax on energy generated for barter, sale or exchange. The court apparently failed to appreciate the point or gravity of the objections. It again said in its opinion on final hearing that the purpose of the Act "is to require the payment of a license tax on all electricity and electrical energy generated in the State of Idaho for barter, sale or exchange". It "applies to the practical operations of those systems from which there can be determined the amount of electricity and electrical energy so generated" (R. 56-57). In response to the point here made the court said:

> "The tax provided for by the Act is not measured by the amount of electrical energy transmitted nor by the amount sold or used, but solely by production, regardless of where delivered and sold, as the Act expressly provides that in the generation of electricity and electrical energy for the purposes mentioned in it the ones who do so shall pay the tax of ½ mill per kilowatt hour on the amount of such electricity and electrical energy so produced and not the amount used. *We cannot yield our assent to the interpretation of the Act as given by counsel for the plaintiff when applied to the operations of plaintiff's system, that the amount of kilowatt hours generated can only be measured by meters at the points of use of customers in Utah.* For as has been said the plaintiff has determined that fact by its meters at its generation stations in Idaho for it has given the exact number of kilowatt hours of energy generated at such stations and pleaded specific amounts of 'sales in Idaho', 'transmission, distribution and sub-station losses pending its business in Idaho', and 'station use in Idaho for plaintiff's own purposes and not for barter, sale or exchange'. Counsel for plaintiff have confused the word 'production' of energy expressed in the Act with transmission, use and delivery, *and their contention that the*

> *energy transmitted and delivered to Utah consumers for barter, sale or exchange must be measured there and determined on data assembled from readings taken in Utah, cannot be sustained when we remember that the Act relates only to energy 'produced' in the state of Idaho,* which can be determined under the testimony, at 'places of production' and before it is transmitted to the foreign state" (R. 60) (Italics ours).

In its formal findings of fact the court says:

> "The defendants have prescribed forms and have notified the plaintiff that it must pay such tax as provided for in said Act without regard to whether or not said electrical energy is consumed within or without the State of Idaho and irrespective of transmission losses, but not including such electrical energy as is used by the plaintiff in station uses. Defendants will attempt to collect only such penalties of plaintiff as accrue under the provisions of this Act, subject to the decree of this Court, for failure to pay a tax on electricity generated for barter, sale and exchange" (R. 85).

Upon this finding the court concludes that "Said Tax Act is not void for uncertainties and ambiguities" (R. 94).

As stated under Point I of the argument, there is no contention that energy cannot be measured at the generating station as well as at any other place on the system. The contention is that energy generated for barter, sale or exchange cannot be so measured. Certainly the court cannot conceive of energy generated to supply the transformer and transmission uses or losses as generated for barter, sale or exchange. In brief, the court below has ignored the problem entirely.

(3) It is to be observed that the Tax Act is not only highly burdensome as a tax, so that it is most important that the tax to be paid should be definitely determinable from the Act itself, but the Act is highly penal in its nature. By Section 1 of the Act the burden of determining the kilowatt hours generated for barter, sale or exchange, if they are the basis of the tax, is upon the producer. By Section 7 "Any

person, officer, partner, agent or representative of any producer referred to in Section 1 of this Act, who shall make any false statement or affidavit in any certificate, report or statement herein required to be made to the Commissioner of Law Enforcement hereunder shall be deemed guilty of perjury". By Section 8 any producer who violates any provisions of the Act or fails to pay the license tax "or any part thereof" when due shall be liable for three times the unpaid or delinquent tax, and "an injunction may be issued, without requiring any bond, restraining the defendant from continuing to produce the electricity or electrical energy so long as any taxes due hereunder from said defendant remain delinquent". By Section 2 interest at the rate of ten per cent. per annum also accrues on taxes not paid on the due date. As referred to in the opening statement, there is no provision either in the Act or in the General Laws of Idaho for the recovery back of the tax paid under protest. Now certainly if one is to be thrown into jail and have his lawful business enjoined unless he complies with the terms of the statute, or submits to any construction thereof that the administrative official charged with its enforcement may make, the statute must be drafted with such certainty that the taxpayer, or his lawyer, or the court in a test case, should be able to interpret it with definiteness and certainty so that there is no question of the taxpayer's liability and obligation. This statute does not meet this fundamental requirement.

The law which we think applicable here is expressed in *Connally* v. *General Construction Company,* 269 U. S. 385, at page 391:

> "* * * a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.
>
> "The result is that the application of the law depends not upon a word of fixed meaning in itself, or one made definite by statutory or judicial definition, or by the context or other legitimate aid to its construction, but upon the probably varying impressions of juries as to whether

given area are or are not to be included within particular localities. *The constitutional guaranty of due process cannot be allowed to rest upon a support so equivocal.*" (Italics ours.)

In this case is approvingly cited, *United States* v. *Capital Traction Company,* 34 App. D. C. 592. The court said of a statute which was indefinite and made it a criminal offense for a street railway company to run an insufficient number of cars to accommodate persons desiring passage thereon (p. 598):

> "'The dividing line between what is lawful and unlawful cannot be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal statute cannot rest upon an uncertain foundation. The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another'."

In *Western Union Tel. Co.* v. *Texas,* 62 Tex. 630, it was said (pp. 635-6):

> "It is of the utmost importance, for the protection of the taxpayer, that tax laws should be certain, both as to the thing taxed and as to the amount of the tax, and the manner for its ascertainment; that the taxpayer may have an opportunity, without the expense of litigation, to pay such taxes as he may owe; and a tax law which does not accomplish this purpose ought to be held invalid, whether this results from an attempted exercise of power not possessed, through which the law becomes uncertain by both proper and improper subjects being combined and selected for taxation, or by the failure of the legislature for any other reason to furnish the rules by which taxes may be levied, assessed and collected."

In *Standard Oil Co.* v. *State,* 178 Ala. 400, it was said, in speaking of a tax statute (pp. 402-404):

> "Rather than nullify the section on the ground of uncertainty, the court will seek out and adopt any reasonable construction of which it is susceptible; but 'when the language of an act appears on its face to have a meaning, but it is impossible to give it any precise or intelligible application in the circumstances under which it was intended to operate, it is simply void.' * * * The intention of the Legislature must be ascertained from the words of the section. 'The court may not allow conjectural interpretation to usurp the place of judicial exposition. There must be a competent and efficient expression of the legislative will.' * * * The case presented is not one in which insensible words may be eliminated; for the words which it is proposed to eliminate are not insensible in themselves, but only so because of their reference to some other unexpressed intention of the lawmakers which is past finding out. They demonstrate, not only their own inefficiency, but also the incompleteness of the preceding provision of the section, without affording any clue as to what it would be in its complete state. To give the section the meaning contended for would establish for it a meaning that the Legislature clearly did not intend. Being unable to ascertain and declare the legislative will, inscrutable in essential part, and being denied the legislative function under the Constitution, the court has no recourse but to declare the section void and of no effect."

See also:

International Harvester Company v. *Kentucky,* 234 U. S. 216.

United States v. *Shreveport Grain & Elevator Co.,* 46 Fed. (2nd) 354.

We submit that the statute as construed by the court below as levying a tax on energy generated for barter, sale or exchange is void for ambiguity and uncertainty.

Conclusion

We respectfully urge that the decree of the court below should be reversed with directions to enter a decree making permanent the interlocutory injunction theretofore granted, restraining the enforcement of the Tax Act under review.

Respectfully submitted,

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APPENDIX.

CHAPTER 3
(H. B. No. 3)

AN ACT

LEVYING A LICENSE TAX OF ONE HALF MILL PER KILOWATT HOUR ON ELECTRICITY AND ELECTRICAL ENERGY GENERATED, MANUFACTURED OR PRODUCED IN THE STATE OF IDAHO FOR BARTER, SALE OR EXCHANGE; AND PROVIDING FOR THE COLLECTION AND DISTRIBUTION OF SUCH TAX; AND FOR FORMS AND PROCEDURE TO BE USED AND FOLLOWED; REQUIRING REPORTS OF THE PRODUCTION OF ELECTRICITY AND ELECTRICAL ENERGY AND THE FURNISHING OF EQUIPMENT FOR MEASURING SAME; PRESCRIBING PENALTIES FOR VIOLATION OF THIS ACT; EXEMPTING FROM SUCH LICENSE TAX THE ELECTRICITY AND ELECTRICAL ENERGY ACTUALLY USED FOR PUMPING WATER FOR IRRIGATION PURPOSES ON LANDS IN THE STATE OF IDAHO AND PROVIDING THAT SUCH EXEMPTIONS SHALL ACCRUE TO THE BENEFIT OF THE CONSUMER OF SUCH ELECTRICITY AND ELECTRICAL ENERGY; PRESCRIBING THE DUTIES OF THE STATE COMMISSIONER OF LAW ENFORCEMENT UNDER THIS ACT, REQUIRING HIM TO GIVE A BOND FOR THE FAITHFUL PERFORMANCE OF SAID DUTIES AND FIXING THE AMOUNT THEREOF, AND MAKING AN APPROPRIATION WITH WHICH TO CARRY OUT ITS PURPOSES.

Be it Enacted by the Legislature of the State of Idaho:

SECTION 1. That in addition to the licenses and taxes now provided by law, each and every individual, firm, partnership, common law trust, corporation, association or other organization, now engaged or hereafter to engage in the generation,

manufacture or production of electricity and electrical energy in the State of Idaho, either through water power or by any other means for barter, sale, or exchange, and hereinafter referred to as the "producer", shall on or before the fifteenth day of each calendar month, beginning with the 15th day of July, 1931, render a statement to the Commissioner of Law Enforcement of the State of Idaho of all electricity and electrical energy generated, manufactured or produced by him or it in the State of Idaho, during the preceding calendar month and therewith pay a license tax of one-half (½) mill per kilowatt hour on all such electricity and electrical energy so generated, manufactured or produced, measured at the place of production and as shown on such statement in the manner and within the time hereinafter provided.

SECTION 2. Said license tax shall be remitted with the statement and paid on or before the fifteenth day of each month, beginning with July 15, 1931, to the Commissioner of Law Enforcement, who shall receipt therefor and promptly turn same over to the State Treasurer, as other receipts of his office, and the State Treasurer shall place same to the credit of the General Fund. Taxes not paid on the due date shall become delinquent and shall bear interest from said due date at the rate of ten per cent per annum.

SECTION 3. On or before July 15, 1931, every producer referred to in Section 1 of this Act engaged in the production, generation or manufacture of electricity or electrical energy, shall make and file with the Commissioner of Law Enforcement of the State of Idaho, on forms prescribed, prepared and furnished by the Commissioner of Law Enforcement, a duly acknowledged and verified certificate which shall contain: (a) the name under which the producer is transacting business in the State of Idaho; (b) his or its post office address and principal place of business within the state; (c) the address and location of his or its production plants or stations in Idaho; (d) the name and address of the managing

agent; (e) the names and addresses of the several persons composing any firm or partnership constituting the producer, and, if a corporation, the corporate name under which it is authorized to transact business and the names and addresses of its officers, directors, resident general agent and attorney in fact; (f) certified copies of any papers necessary to show that such producer has complied with the laws of the State of Idaho in order to transact business in Idaho.

SECTION 4. Every such producer shall on or before the fifteenth day of each calendar month, beginning with July 15, 1931, and monthly thereafter, render to the Commissioner of Law Enforcement of the State of Idaho on forms prescribed, prepared and furnished by the Commissioner of Law Enforcement, a statement sworn to by the manager, president, secretary or treasurer of such producer, showing the number of kilowatt hours of electricity and electrical energy produced, generated or manufactured by him or it during the preceding calendar month. For the purpose of measuring such electricity and electrical energy such producer shall keep and maintain at the point or points of production, a recording watt hour meter or meters, or other suitable instrument for measuring the electricity or electrical energy produced, of a type to be approved by the Commissioner of Law Enforcement, the recordings therefrom to be kept on file at the principal place of business of such producer within the State of Idaho and same together with the books and records of such producer shall be subject to the inspection of the Commissioner of Law Enforcement, his deputies or assistants, during reasonable business hours.

SECTION 5. All electricity and electrical energy used for pumping water for irrigation purposes to be used on lands in the State of Idaho is exempt from the provisions of this act, except in cases where the water so pumped is sold or rented to such irrigated lands. Provided, the exemption here given shall accrue to the benefit of the consumer of such electricity or electrical energy. Provided further that the

full amount of such license tax which would have been due from such producers of electricity and electrical energy, if such exemptions had not been made, shall be credited annually for the year in which the exemptions are made on the power bill to the consumer by the producer of such electricity and electrical energy, furnishing such power, and such producer shall include a statement of the amount of electricity and electrical energy exempted by this section, furnished by it for the purpose of pumping water for irrigation purposes on lands in the State of Idaho, to the commissioner of Law Enforcement of the State of Idaho as a part of the statement required by Section 1 of this Act, together with a statement of the credits made on the power bills to the consumers of such electricity and electrical energy for the pumping of water for irrigation to be used on lands in the State of Idaho.

SECTION 6. Any producer of electricity or electrical energy referred to in Section 1 of this Act who shall hereafter engage in the generation, production or manufacture of electricity or electrical energy shall immediately upon purchasing or acquiring the plant, or installing equipment therefore, comply with the requirements of Section 3 of this Act.

SECTION 7. Any person, officer, partner, agent or representative of any producer referred to in Section 1 of this Act, who shall make any false statement or affidavit in any certificate, report or statement herein required to be made to the Commissioner of Law Enforcement hereunder shall be deemed guilty of perjury and upon conviction shall be punished by imprisonment in the state penitentiary not less than one nor more than fourteen years.

SECTION 8. Any producer referred to in Section 1 of this Act who shall violate any of the provisions of this Act or who shall fail to pay the license tax herein provided for, or any part thereof, when due shall be liable for three times the amount of the unpaid or delinquent tax, in a civil action instituted for that purpose in any court of competent jurisdiction,

by the Commissioner of Law Enforcement in the name of the State of Idaho, and in such suit upon application of the State, an injunction may be issued, without requiring any bond, restraining the defendant from continuing to produce electricity or electrical energy so long as any taxes due hereunder from said defendant remain delinquent.

SECTION 9. The State Treasurer shall, on or before the twentieth day of August of each year, beginning with August 20, 1931, prepare and furnish to the chairman of the State Board of Equalization a statement showing the total amount paid into the General Fund for the year ending August 15th of such year from the license tax provided by this Act, and the State Board of Equalization shall deduct such total amount so paid in determining the ad valorem tax for state purposes on real and personal property.

SECTION 10. In addition to any bond provided by law to be given by the Commissioner of Law Enforcement for the faithful performance of his duties, he shall give a fidelity bond in the penal sum of $50,000.00 to the State of Idaho, in the form and manner provided by law for similar bonds of state officers, and duly conditioned for the faithful performance of his official duties prescribed by this Act.

SECTION 11. If any section or provision of this Act be adjudged unconstitutional or invalid for any reason, such adjudication shall not affect the validity of this Act as a whole or of any section or provision thereof which is not specifically so adjudged unconstitutional or invalid.

SECTION 12. There is hereby appropriated out of any moneys in the General Fund, not otherwise appropriated, the sum of Fifteen Thousand Dollars ($15,000.00) or so much thereof as may be necessary, with which to carry out the purposes of this Act.

Approved March 17, 1931.